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CURRENT TOPICS

The New Speaker

SIR HARRY HYLTON-FOSTER, Q.C., has been elected as Speaker by the new House of Commons which met for the first time on Tuesday. Sir Harry is a well-known figure in legal as well as parliamentary circles. Having been educated at Eton and Magdalen College, Oxford, he was called to the Bar in 1928, in which year he was appointed legal secretary to the late Lord Finlay at the Permanent Court of International Justice; in 1940 he became Recorder of Richmond and later in turn became Recorder of Huddersfield and Hull. He took silk in 1947 and entered Parliament in 1950, becoming Solicitor-General and being knighted in 1954 and being appointed a Privy Counsellor in 1957. At fifty-four, a comparatively young man, Sir Harry has a good chance of serving more than one Parliament in his high office; all who cherish parliamentary institutions, and lawyers in particular, will wish Sir Harry a happy and successful career as Speaker.

Costs in Criminal Cases

ALTHOUGH we agree with the LORD CHIEF JUSTICE that there is and should be no fetter on the discretion of a criminal court about whether or not to award costs to a successful defendant, we suggest that a shift of emphasis is needed in some courts. Where the prosecution has been in some way at fault it is difficult to justify a refusal of costs to the defence. Where a successful defendant by lying or folly has largely been the author of his own misfortune it is equally difficult to require the public to pay his costs. The difficult cases, and there are usually several in the course of a year, are those in which both sides have been misled without any fault of their own. A good example is the case of mistaken identity where the police may be fully justified in taking proceedings, but where the defendant is equally blameless. Many people take the view that costs should not be awarded in such circumstances, on the ground that mistakes like these are one of the hazards of life, but we do not agree. The resources of the State are so great that where there is a genuine mistake it is harsh for the burden to fall on the individual.

Suicide and the Law

THE abolition of the felony of suicide is recommended by a strong committee which has examined the question for the ARCHBISHOP OF CANTERBURY. Recommendations are also made that attempted suicide should no longer be an offence; there should be a new offence of aiding, abetting or instigating the suicide of another; coroners' verdicts should refer to

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"other significant conditions" contributing to suicide; an alternative burial service should be available for certain suicide cases and the needs of potential suicides should be commended to the pastoral concern of the clergy. The tenor of this committee's report reflects the changing public attitude towards those who commit or attempt suicide and who mostly need pity and help rather than censure and stigma. An article at p. 821, *post*, traces the changing legal attitude on the question. The Mental Health Act, 1959, which makes provision (still to be brought into operation) for emergency treatment of attempted suicides, omens well for an enlightened view of the subject being shown by Parliament. The Archbishop has written that the authority of the report's recommendations is that of its signatories only. We hope that soon full support for the recommendations will be forthcoming from the Church, and that the new Parliament will lose no time in amending the law in such a desirable direction and in line with modern thought and knowledge on a sad subject.

Major and Minor

"IT'S my road" is among most collections of famous last words. Last Monday, HAVERS, J., held that a driver driving a vehicle on a major road at a reasonable speed was guilty of negligence in not taking steps to see that traffic on a side road was slowing down to wait and not, as his experience had taught him it sometimes did, going to emerge. At first sight the decision seems surprising but it is not really so and in any case it is firmly based on authority. It is significant that the major road had a "Slow" sign painted on it but, quite apart from this, it seems to us that the decision is merely an application of the test of the ordinary reasonable man as stated by Lord Dunedin in *Fardon* v. *Harcourt-Rivington* (1932), 76 SOL. J. 81, when he said: "If the possibility of danger is reasonably apparent, then to take no precaution is negligence; but if the possibility of danger emerging is only a possibility which would never occur to the mind of the reasonable man, then there is no negligence in not having taken extraordinary precautions." However soundly based on authority this decision may be, we foresee that it will constitute a useful bargaining counter in negotiations between plaintiffs and insurance companies.

Young Offenders

ONE of the most interesting aspects of the recently published Report of the Advisory Council on the Treatment of Offenders (The Treatment of Young Offenders: H.M.S.O., 1s. 9d.) is the Council's view that all sentences of detention in a detention centre and indeterminate sentences of custodial training should be followed by a period of statutory after-care, which can be reduced in length if the youth concerned makes good progress. They recommend (i) that the normal period of after-care following a sentence of detention in a detention centre should be one year from the date of release, with a compulsory review after six months which could lead to a recommendation for discharge; and (ii) that the normal period of after-care following an indeterminate sentence of custodial training should be two years, with a compulsory review after one year with a view to the cancellation of the licence where continued supervision is not considered necessary. The team of sociologists at present working in Glasgow believe that approximately three-quarters of the young people who commit offences could be spotted in advance as future delinquents. In their second interim report, entitled "Glasgow Survey of Boys put on Probation during 1957," they say that so many of the probationers showed other signs of unsettledness, apart from delinquency, that it might be possible, by careful observation of children's day-to-day behaviour, to detect those prone to delinquency before they actually commit offences. This finding appears to give rise to the possibility of some form of "before-care." This would be welcome as in this, as in all things, prevention is better than cure, but dangers and difficulties would seem to abound.

Mute Prisoners

WHEN a prisoner refuses or is unable to speak, the court must first decide whether he is mute of malice or mute by the visitation of God. This very important question cannot be answered by the judge (*R.* v. *Israel* (1847), 2 Cox C.C. 263) and, for this reason, a special jury of any twelve men who happen to be present is empanelled to decide this preliminary point. It was thought that the burden of proving that the prisoner is mute of malice rests on the prosecution, and in *R.* v. *Sharp* [1958] 1 All E.R. 62 SALMON, J., directed the jury that if, "having weighed all the evidence, their minds were left in a state of faint suspicion," they were to find the defendant mute by visitation of God. In *R.* v. *Podola*, it is evident that EDMUND DAVIES, J., doubted the authority of the decision of Salmon, J., in *R.* v. *Sharp*, *supra*, and the Court of Criminal Appeal (*The Times*, 21st October) has now upheld his decision and confirmed that *R.* v. *Sharp*, *supra*, was wrongly decided. In our view, this decision does not necessarily vitiate the ruling of Salmon, J., as to the onus of proof on the preliminary point as to whether the accused is mute of malice or by visitation of God. In *R.* v. *Sharp*, *supra*, the jury returned a verdict that the defendant was mute by the visitation of God and the question then arose as to whether the defendant was capable of pleading to the indictment and of standing his trial. Salmon, J., directed that the prosecution should put before the court such evidence as was available to them and should begin, but in *R.* v. *Podola*, *supra*, the Court of Criminal Appeal affirmed that "if the contention that the accused was insane was put forward by the defence and contested by the prosecution there was a burden upon the defence of satisfying the jury of the accused's insanity; in such a case, as in other criminal cases in which the onus of proof rested upon the defence, the onus was discharged if the jury were satisfied on the balance of probabilities that the insanity had been made out. Conversely, if the prosecution alleged and the defence disputed insanity, there was a burden upon the prosecution of establishing it" (*per* LORD PARKER, C.J.). Of course, where there is a mute prisoner, once the special jury has been empanelled, evidence may be adduced to prove that the accused is mute by visitation of God (see, e.g., *R.* v. *Roberts* (1816), Car. C.L. 57) or that the prisoner is mute of malice. In a recent case at the Surrey Quarter Sessions which was decided before the Court of Criminal Appeal made known its findings in *R.* v. *Podola*, *supra*, a man charged with shop-breaking did not speak when he appeared in court and a jury was empanelled to decide if he was mute of malice or by visitation of God. Evidence was given that the accused spoke when accepting a cigarette and a warder in Brixton Prison hospital said that once the prisoner began to talk it was difficult to stop him. The jury found that the accused was mute of malice, whereupon the chairman directed that a plea of "not guilty" should be entered and that the trial should proceed in the usual manner (see Criminal Law Act, 1827, s. 2).

PROBLEMS OF SUICIDE: THE CHANGING LEGAL ATTITUDE

THERE is growing agitation for reform of the law regarding suicide. In 1947, the British Medical Association and the Magistrates' Association, in a joint report, recommended the abolition of the crime of attempted suicide, and the B.M.A. reiterated its attitude in a resolution at the 1956 conference. Dr. Glanville Williams, in his recently published book, The Sanctity of Life and the Criminal Law, devotes a long chapter to problems of suicide. Last year there was considerable correspondence in *The Times* on the question, but at that time the Home Secretary did not yield to pressure, giving as his reason that such a change would not be "universally acceptable to public opinion."

On 16th April this year, however, the Home Secretary, in answer to a Parliamentary question, said that a meeting had taken place between officials of his department and of the Ministry of Health with representatives of the joint committee of the B.M.A. and the Magistrates' Association. The meeting explored the crucial problem of ensuring that persons who attempted to commit suicide received treatment for their mental as well as for their physical condition. Although this could be done under existing law, the Home Secretary recognised that there were unsatisfactory features, and before it was changed he wanted to be satisfied that there were workable alternatives. He indicated that, while it might be possible to make further progress on present lines, it was not likely that legislation could be introduced during the last Parliamentary session, and events have proved him right. Even at that, however, the reformers have made considerable advances on the position as it was a year ago.

Legal history of suicide

Philosophers have mulled over the social and moral problems of suicide for centuries, although the first use of the word in English is not dated until 1651. At one time, persons who committed suicide were buried at a crossroads with a stake driven through the body, and a stone over their face. It has been suggested that a *cross* road was chosen for its religious significance, and the stone and stake were intended to prevent the spirit or the body from rising as a ghost. The last person treated to a crossroad interment was buried in 1823, in which year an Act prohibited the practice. Thereafter, private burial by night in a churchyard without religious rites was permitted, and only since 1882 has Christian burial been recognised (Stephen, History of Criminal Law, III, 104, and Glanville Williams, *op. cit.*, p. 233).

Attempted suicide became a crime in England by a rather roundabout process. Every felon forfeited his goods to the King, and it was but a simple step to declare suicide a felony, in order to escheat the estate of the suicide to the King's treasury. Suicide having been accepted as a crime, it naturally followed that attempted suicide also became punishable. Attempted suicide was first prosecuted as an offence in 1854 (*R.* v. *Doody* (1854), 6 Cox 463).

But an attempt to commit suicide is not an attempt to commit murder within the meaning of the Offences against the Person Act, 1861 (*R.* v. *Burgess* (1862), L. & C. 258).

Attitude of other legal systems

After the Revolution in France, the crime of attempted suicide was abolished there, and a number of other European countries followed this example. Nearer at hand, the commonsense treatment of the criminal aspects of suicide in Scotland is instructive to English lawyers.

In Scotland, attempted suicide is not an offence. On rare occasions when the accused has caused public alarm or nuisance by his behaviour, he may be punished for breach of the peace. But at an earlier period, this was not so. In the days of Sir George MacKenzie, Lord Advocate of Scotland, and one of the Scottish institutional writers on crime, attempted suicide was a crime. In 1686 he wrote: "An endeavour to kill one's self is punishable as self murder, if the killer did all that in him was to effectuate it" (Works, II, 110).

Suicide pacts

English and Scots law also approach the question of suicide pacts rather differently. Such pacts may be either "double-suicide" pacts, where the parties agree to die together, each at his own hand, as by taking poison, or "murder-suicide" pacts, as where a husband shoots his wife with her consent, and then turns the gun on himself. The Homicide Act, 1957, s. 4, now provides in England that the survivor of a suicide pact is guilty only of manslaughter, whether or not he killed the other or was a party to the other killing himself or to being killed by a third party.

This section of the Act was specifically excluded from application in Scotland. From this, Glanville Williams has deduced that since the Act *assumes* rather than enacts that Scots law is as lenient as is generally supposed, the possibility of prosecution may now be taken to be theoretical only. The matter is not quite so clear as that. In fact, there does not appear to be any case where the survivor of a suicide pact in Scotland was charged with murder, so we have to look elsewhere for confirmation of this view.

Important evidence on the point was given to the Royal Commission on Capital Punishment (Cmd. 8932 of 1953). Representatives of the Scottish police told the Commission that they always charged survivors of suicide pacts with murder, but Lord Justice-General Cooper, whose views command the greatest respect, said that such cases never went to court as murder, but as a lesser charge. The Royal Commission set out their views on the law in Scotland at para. 167 as follows: "Neither suicide nor attempted suicide is a criminal offence. Consequently, if two persons agree to commit suicide and only one of them dies, it is clear that the survivor would not be guilty of murder, or indeed of any criminal offence . . . On the other hand (in murder-suicide cases) . . . where the survivor was directly responsible for the death of the other party to the agreement, he would be guilty of murder."

Whatever the Royal Commission's view of the law, there is no doubt that the present-day practice is not to charge the survivor of a murder-suicide pact with murder, but, possibly, with culpable homicide, which is the Scottish equivalent of manslaughter. It has been suggested that the absence of reported cases in Scotland on suicide pacts indicates that the Crown Office deals with them very leniently, and as a rule does not prosecute the survivor. This is a mere speculation, of course, since the Crown Office does not make known the principles on which it deals with such cases.

Punishing attempts of suicide

Statistics show that there is little consistency in the manner of treating attempted suicides. In 1956, some 5,837 cases of attempted suicide were reported to the police, but only 613 persons were sent to prison for short sentences of a few

weeks. Home Office instructions to police forces are to prosecute only where there is some definite circumstance calling for punishment or where a court order is the only chance of providing refuge or asylum. This discretion in regard to punishment explains why comparatively few prosecutions are actually brought, but it may be questioned whether it is entirely satisfactory to leave such a discretion entirely in the hands of the police in such a delicate matter.

Some guidance as to length of sentence in cases where convictions for attempted suicide are made was given in *R.* v. *French* (1955), 39 Cr. App. R. 192. In that case, a person charged with larceny attempted to commit suicide while in his prison cell awaiting trial. He was convicted of larceny and attempted suicide and was sentenced to two years' imprisonment on each charge. the sentences to run consecutively. On appeal, a sentence of one month was substituted for the sentence on the charge of attempted suicide.

The observations of Lord Goddard, C.J., are of particular interest. His lordship said: " No doubt, attempted suicide has always been regarded as an offence, but to say that it is to be regarded as a very serious crime shows an entire lack of proportion. It is not a very serious crime in point of law. Whether it is regarded as a sin or not is not a matter for the court. In such cases a short sentence is often given to protect the man against himself. A very great change has come about in this matter since I was first called to the Bar. I remember that, when I was a young man going the Western circuit, prosecutions for attempted suicide were very common at quarter sessions. Now they are rare, and magistrates generally deal with the matter. At any rate, it is absurd to say that a sentence of two years' imprisonment ought to be passed."

Possible reforms suggested

Dr. Glanville Williams suggests possible reforms in the treatment of attempted suicide. He feels that the use of the criminal law is unnecessary and that police interference and the threat of prosecution may be sufficient to drive the would-be suicide to fresh attempts. Other possibilities are to order the person to be detained for a short period in a suitable medical institution for his own protection, or to set up a guardianship procedure for adults in need of care and protection. " Ultimately," says Dr. Glanville Williams, " society cannot stop a free man from committing suicide, nor should it try. What can be done is to make sure that the determination on self-destruction is fixed and unalterable." With regard to persons who, in attempting suicide, constitute a nuisance to the public and to the police, he considers that a specially devised law would be necessary, aimed not against attempted suicide but against deliberate self-endangerment to the annoyance of others.

The Home Secretary will no doubt consider these proposals, along with others, in due course. It is suggested, however, that matters could be much simplified by adopting the Scottish practice of not prosecuting attempted suicide, except as a breach of the peace where circumstances warranted such a prosecution. As a leader writer of *The Times*, commenting unfavourably on the English attitude, drily observed a little while ago—" Not for the first time, Scots law is preferable to the English " (*The Times*, 26th February, 1958).

N. G.

" BOND WASHING "

If, to the uninitiated, the term " bond washing " provides little or no clue to its precise meaning, that is scarcely to be wondered at, for it appears in no statutory enactment. But the expression finds a place in Simon's Income Tax and it was freely (and sometimes scathingly) used by Members in the House of Commons debates on the clauses in the Finance Bill, 1959, relating to " Purchase and Sale of Securities." The financial operation connoted by the jargon is usually performed in connection with Government securities (because of the saving of stamp duty and minimisation of stockbrokers' commission)—hence the word " bond "—while " washing " means simply the washing out or getting rid of the interest on the bonds. It may, of course, well be asked why anyone should wish to get rid of so desirable a thing as interest. The answer is that for tax reasons it pays certain individuals and partnerships to do so.

Methods of operation

Bond washing operates in two different ways. By the first method the owner of securities agrees to sell or transfer those securities " cum dividend," and by the same or a collateral agreement (*a*) agrees to buy back or re-acquire the securities, or (*b*) acquires an option, which he subsequently exercises, to buy back or re-acquire the securities, " ex dividend." The dividend, or more generally the interest, is thus receivable by the purchaser, while the seller makes a capital profit on the deal and saves income tax and surtax which would otherwise be payable by him in respect of the interest. This is bond washing in its original form. The transaction resulted in a loss of surtax to the Revenue, and s. 203 of the Income Tax Act, 1952 (which re-enacted the material provisions of s. 12 of the Finance Act, 1937), was directed against the operation. The section provides that in the circumstances referred to the interest shall be deemed to be the income of the owner of the securities and taxable accordingly; while, so far as the purchaser is concerned, if he is a dealer in securities (as will normally be the case) the transaction is to be disregarded in computing for tax purposes the profits arising from or loss sustained in the trade. The section also applies if the securities sold back or re-transferred are " similar " securities as defined by subs. (5).

It will be seen that s. 203 is of limited application since, for a transaction to fall within it, there has to be what is sometimes described as a " collusive " agreement, while purchases cum dividend and sales ex dividend by dealers in securities, otherwise than as a necessary corollary to sales cum dividend and purchases ex dividend by owners, which are caught by the section, are not penalised. In recent years increasing advantage has been taken of this situation by (i) dealers in securities, (ii) exempt persons (i.e., charities and superannuation funds), and (iii) companies with trading losses, with the result that a new form of bond washing has grown up which is virtually the reverse of the original form. This new form, which in some respects resembles " dividend stripping " (see 102 Sol. J. 335), inasmuch as the aim is to obtain a dividend or interest rather than get rid of it, involves the purchase of securities cum dividend and their sale ex dividend, so that the continued use of the term " bond washing " in relation to *it* seems somewhat inapt.

In the case of the ordinary investor who is not assessable to tax on capital gains or entitled to relief on capital losses there would be little or no point in carrying out an operation of the latter type, because he would not be able to set off his capital loss against the dividend received. Dealers in securities, however, are in a different position since securities are their stock-in-trade. The result of buying cum dividend and selling ex dividend is to create an artificial loss which is legally available for tax relief (although, in effect, the loss is largely bridged by the receipt of the interest), or as a set-off against other profits or income. Charities and pension funds are also able to profit from the operation because they are exempt from tax and can recover the standard rate tax deducted at source, while trading companies with losses similarly benefit by the recoupment of the tax deducted from interest.

In 1957, the Council of the London Stock Exchange tightened up its regulations with a view to preventing bond washing in its new form, but the measures taken proved less effective than was expected. The fasciculus of provisions comprising ss. 23–26 of and Sched. VI to the Finance Act, 1959, is therefore designed to close the gaps which have become apparent in the legislation of 1952.

Scope of the new provisions

Section 23 lays down the limits within which ss. 24–26 operate. They apply where a person (referred to as "the first buyer") buys securities cum dividend after 8th April, 1959, and sells them ex dividend, unless (i) the time which elapses between the purchase by the first buyer and his "taking steps to dispose" of the securities exceeds six months, or (ii) that time exceeds one month and the purchase and sale were each effected at the current market price and the sale was not effected in pursuance of an agreement or arrangement made before or at the time of the purchase. Consequently, if the sale is effected within one month of purchase, ss. 24–26 apply automatically. The phrase "taking steps to dispose" is used instead of "sale" so as to cover the case of a sale in the exercise of an option, in which event the date of acquisition of the option to sell is substituted for the date of sale. What may or may not amount to an "arrangement" is not easy to predicate, but the word was given a wide meaning in relation to s. 50 of the Finance Act, 1938, which concerns stamp duty (see *Escoigne Properties, Ltd.* v. *Inland Revenue Commissioners* [1956] 1 W.L.R. 980).

A sale of "similar securities" of the like nominal amount is equivalent to a sale of the original securities purchased, and where there are purchases of several parcels of similar securities subsequent sales are related to the last parcel bought, and then to the next to the last, and so on. The definition of similar securities in s. 23 (6) (*d*) of the 1959 Act is the same as in s. 203 (5) (*c*) of the Act of 1952, except for a slight extension of meaning in the first-named Act which permits of 3 per cent. Electricity Stock 1968–73 and 3 per cent. British Transport Stock 1968–73 being treated as similar, since both stocks were issued on the same day, both carry the same rate of interest and have the same redemption dates, while each is guaranteed by, or is an obligation in respect of which holders have rights against, the Treasury. "Person" includes any body of persons and, in reference to trusts or funds, includes persons entitled to make claims for exemption from tax.

Subsection (5) provides that, where at the time when a trade is, or is deemed to be, set up and commenced, or at the time of any "relevant change" within the meaning of Sched. III to the Finance Act, 1954 (which relates to company reconstructions without any material change in the ultimate ownership), any securities form part of the trading stock, those securities are to be treated as sold at that time in the open market by the person to whom they belonged immediately before that time, and as bought at that time in the open market by the person afterwards carrying on the trade. But where there is a change in the persons engaged in carrying on a trade which is not deemed to be discontinued, and which is not a "relevant change," the section applies to the person so engaged after the change as if anything done to or by his predecessor had been done to or by him.

Dealers in securities

Section 24, which is the main operative provision, concerns dealers in securities. Subsection (1) provides that, in computing the profits or losses of the first buyer for tax purposes, the price paid by him for the securities (if sold within one month or six months, as the case may be) is to be reduced by the "appropriate amount in respect of the interest," which, for the purposes of s. 24, means the appropriate proportion of the *net* interest receivable by the first buyer calculated in accordance with a formula prescribed by para. 3 of Sched. VI to the Act. The "appropriate proportion" is the proportion which the period between the last ex-dividend date on the London Stock Exchange before the purchase and the day before the purchase bears to the period between the last ex-dividend date before the purchase and the day before the next ex-dividend date after the purchase—the effect being to deduct from the purchase price the proportion of the net dividend which was accruing *before* the purchase and so reduce the dealer's artificial loss which is available for tax relief by that amount. Where the securities concerned are new issues the beginning of the period for which interest was first payable is substituted for the first ex-dividend date, and there is a formula for apportioning up to the date of the purchase of the securities the first interest payment on a security which has not been bought outright but by two or more instalments over a period.

The section does not apply to *bona fide* discount houses in the United Kingdom (of which there are understood to be twelve in London) or to jobbers on the London Stock Exchange (but not brokers) or to recognised dealers on provincial stock exchanges, provided the securities concerned are purchased in the ordinary course of business and provided also, in the case of a dealer on a provincial exchange, the securities are ones in which he is authorised to deal by the committee of the stock exchange.

As originally drafted the Finance Bill contained no exemption in favour of arbitrageurs who deal in internationally quoted stocks in more than one market, but an amendment introduced at the Report Stage gives them a conditional exemption if the securities are "overseas securities" (defined as securities of the government of, or of a body of persons resident in, any country or territory outside the United Kingdom and the Republic of Ireland), which are bought by the first buyer on a stock exchange outside the United Kingdom in the course of his trade. Three further conditions must also be satisfied: (i) the interest must be brought into account in computing the profits or losses of the trade, (ii) the first buyer must be excluded from claiming relief under s. 201 of the Income Tax Act, 1952, from tax on dividends from overseas companies which have paid United Kingdom income tax, and (iii) the first buyer must elect that credit

shall not be allowed against income tax or profits tax under ss. 347 or 348 of the 1952 Act (double taxation relief) in respect of the interest.

As might be expected, s. 24 does not apply if the transaction has to be left out of account in computing profits or losses under s. 203 of the Act of 1952 (the earlier "bond washing" provision); nor does it apply if the interest has to any extent to be brought into account under s. 4 of the Finance (No. 2) Act, 1955 (the "dividend stripping" provision) as if it were a trading receipt which had not borne tax, or if it would have had to be brought into account but for para. 2 of Sched. III to that Act (which concerns dividends at rates not unusually high payable on shares acquired during the preceding twelve months).

Persons entitled to exemption

Section 25 deals with the purchase and sale of securities by persons entitled to exemption from tax (e.g., charities and pension funds) and provides that in such cases the exemption is not to extend to an amount equal to the "appropriate amount in respect of the interest" as determined in accordance with Sched. VI to the Act. The effect of subs. (1) and paras. 2 and 3 of the Schedule is that an exempt person becomes disentitled to reclaim tax on the *gross* amount of the dividend or interest which accrued before the purchase. Accordingly, if a stock goes ex dividend on 1st January and 1st July and a pension fund makes a purchase of securities on 3rd June and sells the same or similar securities as soon as they are quoted ex dividend, it will be entitled to reclaim tax on approximately one-sixth only of the gross amount of the half-year's interest. Moreover, by a proviso to subs. (1), if the exempt first buyer (i.e., the person to whom the interest becomes payable in respect of the securities) has to make any annual payment out of the interest, such annual payment is to be deemed to be paid out of profits or gains not brought into charge to tax and s. 170 of the Income Tax Act, 1952, applies accordingly, so that the tax which the first buyer is entitled to deduct from the payment has to be handed over to the Revenue. If it were not for this proviso, in so far as the accrued interest lost the tax exemption, it would be available to cover retainable charges of the charity or pension fund. Section 25 does not apply where the first buyer is exempt from liability to tax because he resides in the Republic of Ireland.

Traders other than dealers in securities

Traders who are not dealers in securities but who have recourse to bond washing in its new form as a means of relieving trading losses are dealt with in s. 26.

By s. 341 of the Income Tax Act, 1952, a person engaged in trade who makes a loss can set the loss off against any income of his of the same tax year, while s. 15 (3) of the Finance Act, 1953, provides for the carry forward to a year of assessment of losses incurred in the previous year, so far as unrelieved. Also, para. 3 of Sched. III to the Finance Act, 1954, makes loss relief available to a company carrying on a trade after a reconstruction in respect of losses incurred by the predecessor company.

Section 26 (1) of the 1959 Act provides that, in ascertaining whether any or what repayment of tax is to be made to a trader under any of the three statutory provisions above referred to, there shall be left out of account (as in the case of exempt persons) the "appropriate amount in respect of the interest," that is to say, the gross amount of the interest (including any tax paid on that amount) which accrued before the purchase of the relevant securities. Under subs. (2), where the first buyer is a company and carries on a trade not falling within s. 24 of the Act, or a business consisting mainly in making investments, then the "appropriate amount in respect of the interest" is also left out of account in determining whether a surplus exists out of which a subvention payment between associated companies in respect of losses can be made in accordance with s. 20 of the Finance Act, 1953. Moreover, if any annual payment which has to be made by the company is to any extent payable out of the interest (on the securities), that annual payment is deemed to that extent not to be payable out of profits or gains brought into charge to tax and is assessable to tax under s. 170 of the Income Tax Act, 1952, as in the case of charities and pension funds.

Subsection (3) provides for an addition to be made to the "dividend stripping" provisions of the Finance (No. 2) Act, 1955, as modified and extended by s. 18 of the Finance Act, 1958. This addition consists of a new para. (*e*) to follow para. (*d*) of sub-para. (3) of para. 5 of Sched. III to the Act. Paragraph (*d*) provides, in the case of a company not engaged in dealing in securities, for the deduction of certain amounts from income in determining whether a dividend has been paid out of accumulated profits. To prevent hardship where a trader is caught both by the 1955 Act and by s. 26 of the Act of 1959, the new para. (*e*) provides for an additional deduction of such an amount as would (saving an exception as to the method of determining the amount), after deduction of tax at the standard rate, be equal to the amount of the reduction in price which would fall to be made under s. 24 of the 1959 Act.

Effect of the new legislation

In the House of Commons, during the debate on the Bill, it was strenuously argued by some Members that the period of one month should be deleted from the Bill so that, in any event, bond washing would be penalised if the operation were completed within six months of the purchase by the first buyer. The Financial Secretary to the Treasury (Mr. J. E. S. Simon) stated in reply that in practice the interval between the purchase cum dividend and the sale ex dividend was only "a few days." There were two reasons, he said, why a person who tried to operate outside the one-month period was likely to run into trouble: (i) the market might easily turn against him, and (ii) if he operated on borrowed money, the longer he held the stock the more that "militated against the dividend which constituted the profit." If six months were accepted as the minimum period, it would mean that an institution which had money available would feel unable to invest it in any stock whose ex-dividend date was approaching unless it were certain of leaving the investment undisturbed for at least six months. That would involve the periodical withdrawal of support from the gilt-edged market as the dividend period approached on a scale which would very seriously affect the stability and efficiency of the market. It is therefore necessary, in view of this reply, to regard the new legislation not as an attempt to stop bond washing at any price, but as a measure designed to curb it and keep it within bounds without undue injury to the gilt-edged market. And it is, of course, to safeguard the proper functioning of the gilt-edged market that *bona fide* discount houses, jobbers and dealers are exempted under s. 24 (2).

Arbitrageurs (who are not also *bona fide* discount houses) are not so happily placed since theirs is a conditional exemption and, it is considered, not a very good one at that, since it is

a condition that the overseas securities are bought by the first buyer on a *stock exchange* outside the United Kingdom, whereas, in practice, many overseas securities are bought " over-the-counter " and otherwise not through a stock exchange as the term is understood in this country. Merchant banks and stockbrokers (other than brokers who are also dealers within s. 24 (2) (*c*)) enjoy no special exemption.

Speaking of what is now s. 25 and referring to pension funds in particular, Mr. Simon had this to say : " The normal practice of a pension fund is to have a portfolio with maturities spread according to the actuarial expectation of the falling in of their obligations. I do not believe that the practice that some pension fund managers have been adopting of playing the market and buying up dividends is the proper function of a pension fund." Presumably, however, a six-months' dividend and refund of tax for holding a security for one month and a day will still prove attractive to some managers.

Having regard to the trend of recent legislation it is not surprising that those who seek to alleviate their trading losses by bond washing operations are to have their opportunities restricted, but the main sufferers will, of course, be the dealers in securities. How much or how little they will suffer remains to be seen, but certain it is that bond washing will not be brought to a full stop—particularly as some companies have been formed solely for the purpose of bond washing !

K. B. E.

Law Reform Series

GAMBLING AND GAMING

WHEN the keen law reformer allows his eye to alight on a branch of the law which is to be found set out in no less than twenty-one extant statutes dealing, piecemeal, with separate aspects of a subject, and reflecting social outlooks differing as widely as those prevalent in England under Henry VIII, Queen Anne, the Georges and Victoria, he might legitimately feel that he is scanning a field in which his talents should have full rein. Such a branch of English law is that which relates to betting and gaming. Almost entirely the child of statute—the only common law on the subject being to the effect that cockfighting is illegal—it originated with an Act designed to discourage the soldiers of Henry VIII from spending time in " sondrie new and crafty games and playes . . . " which might have been better spent in perfecting their archery. The irrelevance of this statute to the outlook of twentieth-century England is perhaps made even more clear when it is realised that the crafty games referred to included " slydethrifte " and " cloyshe " as well as the more readily recognisable " tennysplaye." The patchwork quality of this legislation and the difficulties to which it has given rise are well known to all lawyers who have ever had the misfortune to meet with it in their professional career. The legal profession will not therefore need much convincing of the unsatisfactory nature of the law as it now stands. The layman however may not be so easily persuaded—indeed there seems to be an inherent resistance in the layman even to considering the desirability of legislation in this field. It is perhaps, therefore, worth considering the more general defects that affect the legislation in its present form.

Negative form of gambling legislation

Gambling legislation has, hitherto, been of a purely negative nature taking the form of attempts to stop particular types of gambling which the legislators of the time thought especially productive of social evils. No attempt has ever been made to deal with the problem in a comprehensive way. Still less has any real attempt been made by Parliament to think out, logically and without bias, how the law can be made to fit the twentieth-century moral outlook and to take account of twentieth-century facts and realities.

The main reasons why existing legislation is unsatisfactory are not hard to see. Aimed at specific forms of gambling, without controlling those who provide the facilities for the particular form of gambling aimed at, the law is very difficult to enforce. That this is so is seen by the utter failure of the Street Betting Act, 1906, to achieve its purpose. Those who doubt the difficulty of enforcing this type of legislation are recommended to read the evidence given before the Royal Commission on Betting, Lotteries and Gaming, which shows in a striking way both the difficulties facing the police and the general disregard by the public of the provisions of the existing legislation. Closely linked with the difficulty of enforcement is the fact that this type of legislation tends to lead to class distinctions. It is of course trite to say that the social consequences of gambling are more serious among the poorer sections of the community than amongst those who are better off. It has in the past therefore often been the intent of Parliament to restrict those forms of gambling to which the poorer members of the community are prone. This leads, not infrequently, to a situation which makes it illegal for one section of the community to indulge in a particular form of gambling while the better off may take part in it with impunity. The obvious example of this is off-the-course betting.

Where legislation is directed against particular forms of gambling it fails to prevent or even reduce the practice of gambling generally. So long as there is a demand for gambling, those who provide facilities for it will quickly discover a new way of satisfying the demand as any particular method is prohibited. As the report of the Royal Commission said : " Throughout the history of gambling legislation new forms of gambling have been found to take the place of those which the Legislature has sought to repress in such a way as to stultify the general social object of the legislation." Furthermore, though this fact accelerates the change of fashion in gambling, there is in any event a steady change of taste in these things as in others, so that types of gambling considered at one time to cause serious social evils may in course of time become relatively harmless, in which case the restrictions imposed on them are regarded as irksome and unnecessary and are therefore ignored. Few nowadays consider whist drives to be a source of serious social evil and so the legislation is rarely, if ever, invoked to suppress them.

Desirable principles of legislation

These arguments point to the unsatisfactory nature of the present position. What, though, should be the principles

of any legislation designed to rectify it? First, and in this field possibly the most important to remember, is the old, though frequently forgotten, principle that politics is the art of achieving the possible. This means that no good will be achieved by failing to recognise the undoubted fact that Englishmen will gamble. The State need not approve of gambling, but it would be failing in its duty to govern if it failed to control it in a way that had the broad support of public opinion. It is not easy to say with certainty what public opinion is, but it is probably true that there would be general public support for any legislation that effectively achieved three things. First, the prevention of young people taking part in any form of organised gambling. For the unformed character gambling has special dangers, and to him the financial inducements appear even more attractive than to an adult. Secondly, gambling legislation should apply fairly to all sections of the community. Apart from the obvious importance of this proposition in the age of the "common man," it is important because the enforcement of gambling legislation depends, perhaps to a greater extent than any other type of legislation, on the support of public opinion. Finally, the legislation should be designed to discourage, or prevent, excessive gambling. If these three purposes were achieved by any new legislation, public opinion would in all probability give its full support.

The Royal Commission recommended that there should be strict control over the provision on a commercial basis of all major forms of gambling facility including the licensing or registration of all those who provide such facilities. This would seem to be a fundamental necessity if any of the purposes set out above are to be effectively achieved. Unless this form of control is introduced, there is no reliable method of preventing undesirable persons from entering the business, or of measuring the extent of gambling. Without an idea of the extent of gambling it is difficult for public opinion to be well informed.

The field in which such a reform would be felt most acutely would be off-the-course betting. It is in this field that some of the greatest social anomalies occur and that public opinion is particularly restive.

Restrictions on gaming

When one comes to consider gaming, as opposed to gambling generally, these principles have to be somewhat amplified. The rapidity of turnover in many of its forms, unparalleled in other types of gambling, together with the spirit of competition that it may engender, provide an incentive for the player to stake beyond his means. Thus restrictions on commercially organised gaming are probably necessary and would be supported by public opinion if reasonable. They must not, however, turn the law into a laughing stock by interfering unduly with forms of private gaming such as bridge and whist-drives. The Royal Commission recommended that it should be illegal to provide facilities for any type of gaming in which (*a*) by reason of the nature of the game the chances of all the players were not equal; (*b*) a toll is levied on the stakes as the game is played; (*c*) any charge is made which varies with the stakes for which the game is played.

This general provision, together with one which would except gaming parties where the proceeds are devoted to purposes other than private gain and are on a comparatively small scale, would go a long way to bringing the archaic laws into line with present-day public opinion.

Whatever is proposed will, no doubt, be met with a cross-fire from, on the one hand, the puritans who would try to stamp out all gambling and, on the other, the organisers of gambling, who would protest that undue restrictions were being put on their liberty. A new Government has recently been elected to office. Might it not be a suitable start to its life to make time for some legislation that, though liable to evoke strong feelings in parts of the public, would bring reason into a chaotic branch of the law?

PATRICK MEDD,
Secretary, the Inns of Court Conservative and Unionist Society.

COUNTY COURT COSTS

"I ONLY ASKED"

THE name of Donald Campbell is usually associated with speed records on water. It is therefore rather interesting to find it also associated with an endurance record in court. The report of the (unconnected) case of *Donald Campbell & Co.* v. *Pollak* [1927] A.C. 733 occupies nearly 100 pages and anyone brave enough to read it will discover, ***inter alia***, that the House of Lords decided that though a successful party in a non-jury action may reasonably expect to be given his costs, the matter is entirely in the discretion of the court.

In theory, therefore, a successful litigant in the county court has to ask for his costs, but judges and registrars have become so expert at thought-reading that they usually make an order for costs on the appropriate scale without any formal request. The scales themselves are of course designed to ensure as a general rule that the amount of costs is reasonable having regard to the sum recovered, but in a number of instances additional benefits can be obtained if asked for. It is therefore always as well to have one eye on the main chance and the other on Ord. 47.

This is one of those orders with a large number of rules—forty-eight to be exact—most of which are of a somewhat humdrum nature (if anything to do with costs can properly be so described). The first of these confirms the record in the *Donald Campbell* case by stating specifically that in general costs are in the discretion of the court. Among the other forty-seven will be found some eight that practitioners who wish to make the most out of county court litigation would do well to bear in mind.

It is in the first place important to differentiate between actions for the recovery of money only, and all other actions. The costs that can be recovered in the former are governed strictly by scale (r. 6). The only exception to this is when the judge (or registrar—Ord. 48, r. 51 (1)) certifies that a difficult question of law or a question of fact of exceptional complexity is involved, when costs may be awarded on any scale (r. 13). Such a certificate is rarely given, but its possibility might well be remembered by the enterprising advocate.

In all other cases, with two minor exceptions, r. 15 applies, and the court has an absolute discretion to award costs on any scale it thinks fit. This would appear frequently to be forgotten by judges, registrars and solicitors alike, and surely herein lies a fruitful field for the intelligent inquirer since a

large number of cases, including hire purchase and possession actions, come within this category.

Quite apart from this, the court also has power under r. 21 (2) and (3) to direct that on taxation the registrar shall not be bound by scale in respect of most of the main items of the bill. This applies where costs are awarded on scales 2, 3 or 4 and the scale allowance in respect of some one or more items would appear in the circumstances to be inadequate.

Application for such a direction should be made at the hearing, and indeed it is suggested that all requests for extra benefits should so be made unless the discretion is one specifically reserved to the registrar on taxation, as for instance in the case of solicitor and client bills, to which reference is made later.

Counsel's fees

In general, the rules dealing with counsel's fees (rr. 18 (1), 19 and 20) are of little practical importance to solicitors since experience has shown that even the most white-wigged junior, whatever else he forgets, seldom needs to have his gown tugged when it comes to asking for his own fees to be allowed. Rule 20, however, is of interest since it appears that in an action that is not one for the recovery of money only, a brief fee can be allowed without the judge's certificate even when there is an admission, or the defendant does not appear at the hearing. As this only arises on taxation, solicitors cannot rely upon the self-interested vigilance of counsel in this respect. It does not of course follow that a registrar will necessarily allow such a fee ; but in cases in which it is desirable to brief counsel even if no defence has been filed, such as possession actions, there is at least a reasonable chance of getting away with it.

A point often overlooked in the flushed moment of victory is that, unless the court is asked to give a certificate at the time of the trial, an expert witness is not entitled to a qualifying fee (r. 30). Furthermore, expert witnesses being expensive, it is usually desirable to ask for leave to increase their witness fees. Even the most inexpert expert is inclined to turn up his nose at the ten guinea witness fee and five guineas qualifying fee provided for by r. 11 of the County Court (Amendment) Rules, 1959.

Solicitor and client taxations are governed by r. 40, of which sub-rr. (7) and (8) are particularly noteworthy. The former allows a registrar to disregard any direction as to scale given at the trial, and the latter allows him to give any certificate that the judge could in relation to party and party costs. Moreover, he does this at the time of taxation. These powers used in conjunction with r. 21 give him virtually unlimited scope to allow anything that he thinks proper.

Assessment of costs

If a solicitor wishes to avoid the time and trouble involved in bringing in a bill for taxation, he may ask for his costs to be assessed under Appendix E (r. 37). The limits applicable are not great—£3 to £6 on scale 2 ; £5 to £10 on scale 3 ; and £8 to £15 on scale 4—but the court has no power to force assessment. The request must come from the successful party, who always has the right to bring his bill in for taxation if he so wishes.

There was an old saying to the effect that those that asked could not have and those that did not ask could not want. Some courts might conceivably be Victorian enough to apply this principle to requests under the rules mentioned above, but most are well aware of the difficulties that beset those who practice in county courts and would listen sympathetically to a plea for a higher scale or special allowance if coupled with a reference to the specific rule that empowers them to grant it. Indeed, such a request might well be difficult to refuse. In any event, the inquirer could always console himself with the thought that " he only asked."

J. K. H.

Practical Conveyancing

NEW STREETS

THE conveyancing implications of the New Streets Act, 1951, were discussed in these columns (95 SOL. J. 540 *et seq.*) shortly before the Act came into force. The New Streets Act, 1951 (Amendment) Act, 1957, made a number of important changes in the rules and we find that there is some doubt about the manner in which these statutory rules may have to be taken into account on the sale of plots or houses on a building estate. Consequently, some further comment may be helpful. Incidentally, the statutory provisions are consolidated in a more convenient form in the Highways Act, 1959, which will come into operation on 1st January next.

The starting point is the prohibition (New Streets Act, 1951, s. 1 ; Highways Act, 1959, s. 192) of the erection of a building, for which plans are required to be deposited in accordance with building bye-laws, which will have a frontage on a private street, unless the owner, or a previous owner, has paid to the street authority, or secured the payment of, a sum on account of the cost of street works. The main purpose is to prevent a heavy liability falling on a purchaser some time after a building has been erected. The terms of the statutes give rise to a number of problems too detailed for consideration in this article. For example, the local building bye-laws provide the test of the buildings affected. It must be noted that the Acts do not apply to land fronting on to a highway maintainable at the public expense. If the street is a private one which is already paved, either no payment will be required or only a small one to cover the cost of bringing the street up to the standard required for adoption by the street authority. These rules do not apply in London (New Streets Act, 1951, s. 9 (1) ; Highways Act, 1959, s. 291) nor in rural districts unless applied by Ministerial Order (1951 Act, s. 9 (2) ; 1959 Act, s. 192 (5)).

There are a very large number of exemptions ; too many to specify here. A builder who is called upon to make a payment or give a security should therefore see whether he can avoid doing so by claiming that his case falls within one of the exceptions (some of which depend on the discretion of the street authority) to be found in the New Streets Act, 1951, s. 1 ; the 1957 Act, s. 6 (1), or (after 31st December, 1959) the consolidated provisions of the Highways Act, 1959, s. 192 (3). In broad terms, it is sufficient to say that the intention behind the exemptions is to avoid the complications of making payments or giving security where a street is already substantially built up or, on the other hand, where there is no likelihood that private street works will be carried out within a reasonable time.

Effect of payment

The local authority fix the amount to be paid or secured according to their estimate of the cost which would *at that time* be incurred if street works were carried out. Unfortunately, as a result of increasing costs and, possibly, some inaccurate estimating, the sums paid or secured have sometimes turned out to be quite different from the cost finally incurred when the work was done.

The fundamental rule (New Streets Act, 1951, s. 3 (1); Highways Act, 1959, s. 195 (1)) is that a sum paid or secured discharges the liability of the owner, or of any subsequent owner, in respect of the carrying out of street works, *to the extent of the sum so paid or secured*. If, however, when the street is declared to be a highway maintainable at the public expense (as often happens), the sum is less than that which becomes payable to the street authority, the balance may be recovered from the then owner in the normal way. On the other hand, if less should be ultimately due, the excess (obtained after realisation of any security) is payable by the street authority *to the person who is then the owner*.

The result is that a payment made or secured becomes an asset available to the owner for the time to be set off against private street works liability. For example, if the street is made up by the builder and so there is no such liability, repayment must (subject to the discretion mentioned below) be made to the person who is owner at the time when the street is declared to be a highway maintainable at public expense. In practice, this state of affairs was found to be unsatisfactory as the builder of a house often undertook to make up the road and expected to receive repayment of the sum he had deposited even if he had sold the house in the meantime; consequently, the New Streets Act, 1951 (Amendment) Act, 1957, s. 1 (1) (which is re-enacted by the Highways Act, 1959, s. 194), provided that in such cases the authority *may* refund to the person at whose expense the works are carried out (that is, normally, the builder developing the estate) the whole of the payment, or such part as represents the extent to which the potential liability for street works has been reduced. The authority are not obliged to do this and must first notify the owner if the land has changed hands since the payment was made.

Agreements as to streets

In practice, these rules have been found to be difficult to operate, although they provide appreciable protection to purchasers. The consequence is that many builders are using an alternative procedure. Section 1 (3) of the 1951 Act provided that no payment or security was necessary where an agreement was made with the local authority under the Public Health Act, 1875, s. 146, whereby the street works would be carried out at the expense of some person other than the local authority so that, on completion of the works, the street would become a highway repairable by the public. A similar arrangement will be possible after this year by virtue of the Highways Act, 1959, ss. 192 (3) (*d*) and 40 (2). It is very often advantageous for a builder to enter into an agreement under which he may, for example, construct carriageways before the first house is commenced, and complete the whole of the necessary street works after all building has been done and purchasers of houses have entered into occupation.

Conveyancing implications

The first conclusion we would draw is that these statutory provisions do not necessarily render obsolete contractual obligations as to street works. If a builder has made a payment or given security, the amount may later prove to be inadequate. In a case in which he has entered into an agreement with the authority, a purchaser from him cannot enforce that agreement and the builder may not be able to carry out its terms (with the result that the authority may enforce the obligation of the owner for the time being). It follows that in the very many cases where a house is bought on the basis that all road works shall be carried out free of cost to the purchaser, it is advisable to obtain independent rights enforceable by the purchaser. The writer suggests that a good form of words is that which received the approval of Lynskey, J., in *Richardson* v. *St. Meryl Estates, Ltd.*, reported in the *Estates Gazette*, 27th April, 1957, at p. 521, namely, to make, form and complete a proper road, and to indemnify the purchaser against road-making charges until its adoption by the authority. Such a term should be included in a contract to purchase and (to avoid any question of merger in the conveyance and to obtain the benefit of a covenant under seal) should be repeated in the conveyance.

The disadvantage of contractual rights of this nature is that their performance may not be adequately secured. It is as well, therefore, to regard them as extending the protection provided to the purchaser by statute. The most important point for a purchaser's solicitor is whether the builder has entered into a statutory agreement with the authority or has made a payment (or given security). As we have noted, payment or security may not completely discharge a future liability in respect of street works. On the other hand, any repayment will (subject to the discretion of the local authority to pay the sum back to the builder if he has borne the cost of the works) be to the owner for the time being. So it is safe to assume that the purchase price may be fixed on the basis that future liability for street works is largely, if not entirely, discharged. If the proper statutory procedure has been followed and, in addition, an adequate covenant has been obtained, the purchaser has been protected in every possible way.

To remove any doubt, perhaps we should point out that a failure to make a payment or give security before commencing building work does not give rise to any defect in the title to the land. The builder is subject to a penalty and the purchaser is deprived of the statutory protection. There is no necessity to mention the payment or security (or the making of an agreement with the authority) in the contract or conveyance to the purchaser. The benefits which he obtains are consequent on the terms of the statutes.

Once more we have thought it advisable to direct the attention of conveyancers to statutory provisions which, at first sight, appear to be primarily matters concerning local authorities. There is no doubt but that solicitors require to know at least the principles involved in order that they can adequately advise their clients and be able to judge the terms which require to be inserted in conveyancing documents.

J. GILCHRIST SMITH.

Obituary

Mr. HENRY JOHN DEANE, retired solicitor, of Loughborough, died on 7th October, aged 85. He was admitted in 1897. He was the North Leicestershire coroner for fifty years.

Mr. RONALD ROBERTS, solicitor, of Liverpool, was drowned on 28th August off Rhoscolyn Point, Holy Island, Anglesey. He was 59. He was admitted in 1925.

Mr. SAMUEL JOHN BALL THOMAS, retired solicitor, of Long Eaton, died on 6th October, aged 91. He was admitted in 1906.

Landlord and Tenant Notebook

NUISANCE AND MOTIVE

THE interesting point in North, J.'s judgment in *Christie* v. *Davey* [1893] 1 Ch. 316, referred to in our " Current Topics " on 9th October (p. 780, *ante*), was the importance attached by the learned judge to motive. The case was one in which neighbours sued one another for nuisance occasioned by noise. The plaintiffs were a married couple. The husband was, " fortunately for himself," as the learned judge put it, very deaf. The wife taught music and singing ; their daughter, a Royal Academy of Music medallist, taught violin and piano ; their son was an amateur violoncellist ; and a Miss *K*, another medallist who lodged with them, practised, if she did not teach, singing. The day came when the defendant felt himself aggrieved and, as was found, resorted to retaliatory measures, employing not only a concertina but also hammers and tea-trays (not, at the time, recognised as musical instruments).

It was in these circumstances that North, J., granted the plaintiffs an injunction restraining the defendant, his servants and agents, from causing or permitting any sounds or noises so as to vex or annoy the plaintiffs, etc. It would be a fair criticism that the " so as to " does not explicitly indicate the factor of motive ; but the judgment makes it clear that that factor was decisive ; the learned judge found not only that the noises differed in character from those produced in the plaintiffs' house and did not arise from anything done in the course of the defendant's trade, but also that they were made " deliberately and maliciously for the purpose of annoying the plaintiffs." In refusing to grant any injunction against the plaintiffs, North, J., uttered the words set out in our afore-mentioned "Current Topic": " If there were the slightest ground for believing that what has been done by the plaintiff's household had been done maliciously, for an improper purpose, I might have regarded the case with a different view."

Covenants

Nuisance and annoyance, as the judgment shows, may or may not be caused with the object of inflicting damage ; and the law of tort differentiates accordingly. A more recent example of the possible importance of intention was afforded by *Hollywood Silver Fox Farm, Ltd.* v. *Emmett* [1936] 2 K.B. 468, in which the defendant was found to have indulged in shooting on his own land with the object of preventing the plaintiffs' stock, timorous by nature, from breeding ; and MacNaghten, J., applied a *dictum* of Lord Holt in *Keeble* v. *Hickeringhall* (1706), 11 Mod. 74, in which the complaint related to the frightening away of decoy ducks : " Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing ; but to shoot on purpose to damage the plaintiff is another thing and a wrong."

Parties to a lease have been known to sue in tort when no covenant would operate. In *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71, the plaintiff, an auctioneer, took some rooms on the first floor of the Philharmonic Buildings at Cardiff, for use as offices, where he frequently worked late ; the first defendant, his landlord, allowed the second defendant to use a large room above the offices three times a week for the purpose of dancing, musical and other entertainments. Disturbed by the noise and vibration which resulted, the plaintiff sued the first defendant for breach of covenant for quiet enjoyment, and both defendants for nuisance. Kekewich, J., after a careful examination of the authorities, held that the matters were outside the scope of the covenant in question ; but that both defendants were liable in tort. The learned judge, however, after assessing damages at £20, refused to grant an injunction.

Kekewich, J., had recently tried a case in which he had not awarded damages but had granted an injunction, and it so happens that the report of his judgment and of the unsuccessful appeal immediately follows that of *Jenkins* v. *Jackson*. The decision, that in *Tod-Heatley* v. *Benham* (1888), 40 Ch. D. 80 (C.A.), illustrates a number of points ; that with which I am concerned is the point that where there is a covenant against nuisance, and nuisance is proved, it is immaterial whether the covenantor was inspired by evil or by good motives. The defendant, a doctor, was the assignee of a lease (granted in 1823) of a house in South Kensington, and the lease contained a covenant (of the existence of which he had not personally been aware) which, after prohibiting a number of trades—those of a melter of tallow, soap-boiler, slaughterman, lamp-black maker, etc.—went on : " nor do or wittingly or willingly cause or suffer to be done any act, matter or thing in or upon or about the said premises, which shall or may be or grow to the annoyance, nuisance, grievance or damage to the lessor, her heirs and assigns, or the inhabitants of the neighbouring or adjoining houses."

The defendant used the premises as a hospital for poor out-patients suffering from specified diseases or disorders, and it was to be supported by voluntary contributions. There was some conflict of medical evidence on the question whether the diseases and disorders were infectious or merely contagious ; Kekewich, J., thought that there was some danger from infection, but the view taken in the Court of Appeal was that there was " annoyance " if reasonable men were satisfied that serious risk was incurred. As Cotton, L.J., put in when listening to the arguments advanced for the appellant : " Suppose the annoyance to be a matter of sentiment. Still if the sentiment is one which ninety-nine people out of every hundred would share, is not the act an annoyance ? "

Bargain

The point which I wish to stress is indicated by the following passages from the learned lord justice's judgment : "There is a contract between the parties, and, there being nothing wrong in the bargain, the plaintiff has a right to insist upon the price in consideration of which the defendant's predecessors got the property " ; and " No doubt the defendant and those associated with him are doing what they think is very beneficial to the poor people residing round about the place ; and, as far as we can judge, it will be a great benefit to them to have the house used in this way on the basis upon which it has been taken. But we have nothing at all to do with that . . . "

Statutory tenants

The " ground for possession " to be found in the Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I (*b*), " The tenant or any person residing with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers," has been relied upon in countless actions, especially where the landlord has himself been an adjoining occupier ; it may be that most of these have

resulted in conditional orders. For present purposes, interest lies in the fact that this provision operates where there is no covenant. The same applies to the " acts of waste " included in the same paragraph, waste being a tort : *Defries* v. *Milne* [1913] 1 Ch. 98.

Since I began with a reference to our " Current Topics " of 9th October, the occasion for which was a county court case in which the plaintiff's neighbour was said to have " played the same pieces over and over again on the piano," I may conclude by mentioning that repetition of this kind has been held to constitute annoyance in a Rent Act case reported as *Anon.* (1947), 97 L.J. News. 334, C.C. In the recent case, however, the alleged annoyance may have had something rather subtle about it : " . . . he sometimes played ' Ain't She Sweet ? ' " ; in the " *Anon.*" case, not only did repeated quarrels help to establish the necessary guilt, but the defendant appears to have been unable to find anything more inherently annoying than a record of " Moonlight and Roses." This, however, went on every night, often till 4 a.m. and 6 a.m. ; and there were forty signatories to a petition addressed to the plaintiff.

R. B.

HERE AND THERE

IVORY TOWERS

EVERY now and then the suggestion is made that our courts of law, cluttered up with antique trappings and hampered by obsolete forms, are out of touch with life as it is lived in the world of real people. Over a century and a half ago, Lord Chief Justice Kenyon was deeply hurt and affronted when, replying in the House of Lords to a rather testy threat of his to put the customers of gaming houses in the pillory, the Earl of Carlisle lamented that the seats of justice should be occupied by " legal monks, utterly ignorant of human nature and the ways of men." Victorian judges rather liked to exhibit themselves on the battlements of ivory towers, far above the vulgarisms of the colloquial. The palm of that particular sort of exhibitionism went by acclamation to the judge who asked in court, " Who is Connie Gilchrist ? "—a question akin to asking in our own time, " Who is Marilyn Monroe ? " Mr. Justice Darling, who liked to cultivate a reputation for exquisite wit, specialised in that sort of question.

ROLL ON WHAT ?

TO-DAY there is a good deal more excuse than formerly for such questions, since language is moving as fast as technology. To take one modest example, I have never yet heard a wholly satisfactory definition or etymological derivation of the expression " cool cat," but perhaps that is because I am just a " square " not moving or rolling in the right circles. That is why those of us who are no longer in the pleasant springtime of our days will feel that there was some justification for the question which the county court judge at Exeter recently put to counsel, not without a certain prelude of diffident apology : " What is a roll-on ? " In doing so he remarked that he himself went back to the middle ages. In that case perhaps the best starting-point for an explanation would have been the girdle of chastity, especially in a cathedral city where, no doubt, the inner mysteries of female attire are not so lavishly displayed as in the Babylonian capital. As one slowly descends the downward path of the escalator at almost any London underground station, one is put through an entire recognition course in brassières and foundation garments. On every other advertisement one sees graphically displayed what I once saw described in a French fashion paper as " le véritable busty-look américain." No one will ever know how much the innocence of those who use the Temple Station is preserved by the absence of an escalator. I knew a girl at the Bar who was once specially briefed in a case of alleged rape so that she could cross-examine the prosecutrix expertly about her roll-on. Certainly the expression " roll-on " is not self-explanatory. To the literary mind it would only suggest Byron's invocation to the sea. A lawyer would, of course, know that it was not a matter within the jurisdiction of the Master of the Rolls, nor part of the ceremonial equipment for the admission or striking off of a solicitor, even a lady solicitor. A student of juvenile delinquency might conjecture that it had some connection with rocking and rolling. But, even when the article was identified as connected with feminine adornment, there would still be scope for doubt. There are so many things that can be rolled off or rolled on to the female form. In the case at Exeter the issue was further confused because a lady in the case had concealed in her roll-on a great part of some hundreds of pounds in notes, whereas the pounds more usually controlled by that device are avoirdupois. However, all ended lucidly with an explanation from counsel.

RIBS UNDER ROBES

WHILE we are considering that puzzle and its solution perhaps another rather pleasant vision might blend with it. Which of us would not have given much to have been present at the West London County Court at the scene described under the newspaper headline, " A Judge Counts his Ribs in Court " ? The case concerned a fractured tenth rib and in answer to the judge's inquiry the doctor in the case had said that one has twelve on the left side, the tenth being low down. It was at that point apparently that the judge counted for himself. Now you who are not walking skeletons just try counting your ribs through their natural covering and see how soon you can satisfy yourselves without a recount. When one adds the further obstacles of judge's robes and the usual layers of formal legal clothing to be negotiated, one's wonder at the achievement grows. One can only hope and pray that one will be present at some future case in which spinal injury or a slipped disc is part of the *res gestæ* and the conscientious judge will find it necessary to number his vertebræ. To see him groping through his robes and outer and inner garments to handle himself, like his beads, with devout and meticulous care, would be to recognise a fine tribute to the thoroughness of British justice in mastering the relevant facts.

RICHARD ROE.

Personal Notes

Mr. TUDOR H. M. JONES, solicitor, of Rhyl, was married on 3rd October to Miss E. Mair Williams.

Mr. JOHN ROWTON SIMPSON, solicitor, of Leicester, was married on 8th October to Miss Roxane Pickford.

REVIEWS

Current Legal Problems, 1959. Volume 12. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. pp. vii and (with Index) 280. 1959. London: Stevens & Sons, Ltd. £1 17s. 6d. net.

This is the twelfth volume of Current Legal Problems and, in addition to an address by Professor Sir David Hughes Parry to the Bentham Club, it contains the public lectures which were delivered in the Faculty of Laws of University College, London, during the session 1958–59. In our view, the lectures delivered during this session are particularly noteworthy because of the practical nature of many of the topics discussed. A lecture entitled "Safety of Tools and Employer's Liability" is a consideration of the important decision of the House of Lords in *Davie* v. *New Merton Board Mills, Ltd.* [1959] 2 W.L.R. 331; p. 177, *ante*, while other contributions are concerned with such diverse subjects as "The Rating of Charitable and Similar Organisations" and "Crimes on Board Aircraft." Of more general interest is the lecture entitled "Problems of a United Nations Force" and many readers will be pleased that the lecturer concludes that the time appears to be "ripe for thinking at least of situations in which the permanent members of the Security Council may contemplate adopting a policy of mutual self-neutralisation and employ *ad hoc* or permanent interposition forces as symbols of their self-neutralisation."

How to Pay *Less* Income Tax. By H. TOCH, B.Com. pp. (with Index) 164. 1959. London: Museum Press, Ltd. 18s. net.

This is a more useful book than its title suggests. It is not of the type, so popular recently in the periodical press, that tries to show, by taking extremely unlikely circumstances, that the more mistresses a man has the better off he will be. It is in fact a serious and fairly successful attempt to cover, in a practical way, the whole ground of income tax, excluding surtax.

Mr. Toch is not writing for the lawyer and he does not achieve what we like to think is the lawyer's standard of accuracy. For instance, in dealing with the allowance of expenses against business profits he says that "a deduction can only be made if it is expressly enumerated in the Income Tax Acts," although, as is well known, s. 137 of the Income Tax Act, 1952, merely enumerates expenses which *cannot* be allowed and leaves the Commissioners or the court to decide which *can*.

The object of the book is to make laymen more interested in the working of income tax and more critical of its administration. This is a thoroughly laudable object and we hope as many laymen as possible will read the book—not forgetting that many lawyers are also laymen on this particular subject.

Each chapter has a typical illustration by Haro, and we think it should be compulsory for all books on income tax to be illuminated by drawings of this standard.

Key to Income Tax and Surtax—Budget Edition. Forty-eighth Edition. Edited by PERCY F. HUGHES. pp. 223. 1959. London: Taxation Publishing Co., Ltd. 10s. net.

Many solicitors are familiar with and are indebted to this useful guide to the law relating to income tax and surtax. This edition takes into account the provisions of the Finance Act, 1959, and many recent cases and it gives numerous practical examples and full particulars of rates of tax, reliefs and allowances. We do not suggest that there is anything in this work which cannot be found elsewhere, but we doubt whether any other book on these complex subjects contains so much information in such a concise and convenient form.

Annual Practice, 1960. By R. F. BURNAND, C.B.E., M.A., Senior Master of the Supreme Court, A. S. DIAMOND, M.M., M.A., LL.B., a Master of the Supreme Court, and B. G. BURNETT-HALL, M.A., Barrister-at-Law. pp. ccxxiv and (with Index) 2894. 1959. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; Butterworth & Co. (Publishers), Ltd. £4 10s. net.

Only vol. 1 of the Annual Practice is published this year. After the text a supplement to vol. 2 of 1958 has been incorporated, which brings that volume up to date to 1st July, 1959. Volume 1 contains the principal amendments to the Rules of the Supreme Court made since the last edition, *viz.*, rules made under the Maintenance Orders Act, 1958; and R.S.C. Ord. 1, 1959, which provides procedure for appeals from several courts and tribunals. We congratulate the publishers on the prompt appearance of this indispensable work in view of the printing difficulties which occurred earlier this year.

Common Sense in Law. Third Edition. By Sir PAUL VINOGRADOFF. Revised by H. G. HANBURY. pp. (with Index) 192. London: Oxford University Press. 7s. 6d. net.

The purpose of this pocket-sized book is to give the citizen basic information concerning such aspects of the British legal system as are likely to affect him in daily life. It is now thirteen years since the last edition was published, but it has still been found possible to reproduce, for the most part, the author's own work in its entirety. The only changes are in places where the author's statement had ceased to present the existing law correctly, e.g., an example based on s. 4 of the Statute of Frauds has been replaced by one concerned with s. 11 of the Partnership Act, 1890. In addition, the work is well equipped with a table of cases, a short bibliography and an index.

BOOKS RECEIVED

The Jury is Still Out. By IRWIN D. DAVIDSON and RICHARD GEHMAN. pp. 303. 1959. London: Peter Davies, Ltd. £1 1s. net.

Fees and Faculties. Report of a Commission of the Church Assembly. pp. 82. 1959. London: The Church Information Office. 5s. net.

County Court Notebook. Eighth Edition. By ERSKINE POLLOCK, LL.B., Solicitor. pp. 32. 1959. London: The Solicitors' Law Stationery Society, Ltd. 2s. 6d. net.

Trade Union Law. Sixth Edition. By HARRY SAMUELS, O.B.E., M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. pp. xviii and (with Index) 108. 1959. London: Stevens & Sons, Ltd. 17s. 6d. net.

In Some Authority. The English Magistracy. By FRANK MILTON. pp. 168. 1959. London: Pall Mall Press, Ltd. 16s. 6d. net.

Oyez Practice Note No. 38: The Licensing Guide. An outline of the law and practice concerning intoxicating liquor licences. Second Edition. By MICHAEL UNDERHILL, of Gray's Inn and the Oxford Circuit, Barrister-at-Law. pp. 45. 1959. London: The Solicitors' Law Stationery Society, Ltd. 6s. 6d. net.

Fifty-Second Annual Report and Directory of the Insurance Commissioners, State of Oklahoma. pp. 40. 1959. Oklahoma City.

Oyez Table No. 10: County Court Fees as at 1st October, 1959. Prescribed by the County Court Fees Order, 1959. London: The Solicitors' Law Stationery Society, Ltd. 4s. net.

Prideaux's Forms and Precedents in Conveyancing. Twenty-fifth Edition in three volumes. Volume 3. Edited by J. M. PHILLIPS, Barrister-at-Law, E. H. SCAMELL, Barrister-at-Law, and V. G. H. HALLETT, Barrister-at-Law. pp. xcvi and (with Index) 1138. 1959. London: Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. £6 6s. net.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and, in general, full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note

Chancery Division

LANDLORD AND TENANT: APPLICATION FOR NEW LEASE OF BUSINESS PREMISES: WHETHER TENANT ENTITLED TO DISCOVERY OF FIXITY OF INTENTION OF LANDLORD

John Miller (Shipping), Ltd. *v.* Port of London Authority

Roxburgh, J. 14th April, 1959

Procedure summons.

Tenants of business premises applied by originating summons for a new lease of the premises under the Landlord and Tenant Act, 1954. The landlord opposed the application on the ground that on the termination of the current tenancy it intended to occupy the holding for the purposes of its business. The tenants applied for discovery with a view to disputing the fixed and settled intention of the landlord to occupy the premises, but no special circumstances for the granting of discovery were alleged. The landlord's estate officer offered, on its behalf, an undertaking that, immediately vacant possession of the premises was obtained by the landlord, they would be occupied by the landlord for the purposes of its business.

ROXBURGH, J., said that a general practice had been laid down by the Court of Appeal a long time ago. It was a practice, therefore, which was binding upon every puisne judge and every master. It was stated by Lord Greene, M.R., in *Re Borthwick; Borthwick* v. *Beavais* [1948] 1 Ch. 645, who said that in the procedure by originating summons there was really no room for the application of the ordinary, rather strict, rules relating to discovery. Discovery in proceedings in the Chancery Division by originating summons ought only to be ordered in very special cases where the facts were such as to justify such an order. The question was, therefore: Were there special circumstances in this case? In his view, there were; but they were entirely against the granting of this discretionary order. He could not imagine any better evidence of a fixed and settled intention than the undertaking when offered by a body which was in a position to sustain the penal consequences of a breach of the undertaking. The point was dealt with in *Espresso Coffee Machine Co., Ltd.* v. *Guardian Assurance Co., Ltd.* [1959] 1 W.L.R. 250; p. 200, *ante*, in which Romer, L.J., referred to a passage from the judgment of Danckwerts, J., in the second *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* case [1957] 1 W.L.R. 799, in which Danckwerts, J., said that the undertaking seemed to him to compel fixity of intention. Counsel had suggested that it was not an offer to him as he was not the trial judge, but he thought it was an offer to him because this was an application in this very case. However, he agreed that it would not be convenient that he should accept the undertaking in advance of the trial. Before the final order, the court might allow the landlord to resile from that offer; but if it did, the court would make quite certain that it did not prejudice the tenants. Application dismissed.

APPEARANCES: *C. B. Priday* (*Harold Benjamin & Collins*); *Michael Albery*, Q.C., and *Oliver Lodge* (*G. D. G. Perkins*).

[Reported by Miss. V. A. MOXON, Barrister-at-Law] **[1 W.L.R. 910**

INCOME TAX: TRANSFER OF SHARE CAPITAL OF ENGLISH COMPANY TO IRISH COMPANY RESIDENT IN EIRE: WHETHER IRISH COMPANY "A PERSON ENTITLED UNDER ANY ENACTMENT TO AN EXEMPTION FROM INCOME TAX"

Inland Revenue Commissioners *v.* Collco Dealings, Ltd. Same *v.* Lucbor Dealings, Ltd.

Vaisey, J. 24th June, 1959

Case stated by the Special Commissioners of Income Tax.

On 31st October, 1957, a company resident in the United Kingdom sold to an Irish company, incorporated in Eire in 1957 and never resident in the United Kingdom, the whole of the issued share capital of two English companies. Subsequently there were paid to the Irish company interim dividends on the shares in both companies amounting respectively to £174,500 and £104,000, and paid wholly out of profits accumulated before the Irish company acquired the shares. The Irish company claimed exemption from British income tax by virtue of s. 349 of and para. 1 (*a*) of Sched. XVIII to the Income Tax Act, 1952 (which granted exemption from tax to persons resident in the Republic of Ireland, and incorporated the Treaty of April, 1926, with the Government of the Irish Free State). The Crown refused exemption, contending that s. 4 (2) of the Finance (No. 2) Act, 1955, applied, and deducted from the respective amount income tax of £74,162 10s. and £44,200. The Irish company appealed to the special commissioners, contending that the words "a person entitled under any enactment to an exemption from income tax" in s. 4 (2) of the 1955 Act should be limited and controlled so as to exclude residents of Eire who were excluded from the ambit of British income tax by the Treaty of April, 1926. The special commissioners considered, *inter alia*, that the words of s. 4 (2) were wide enough to cover Eire residents so entitled to exemption, but that the very wideness and generality of the words let in the argument that they were to be controlled and limited under certain principles of construction, and they held that the Irish company did not come within the subsection and was entitled to repayment of the tax deducted. The Crown appealed.

VAISEY, J., reading his judgment, rejected the argument based on generality and wideness and said that persons entitled to statutory exemption from tax formed a very limited and well defined class of the community; he would describe the words in s. 4 (2) of the 1955 Act as highly narrow and particular. It was a cardinal principle of construction that the words of a statute must be taken to mean what they say, so that their meaning must be ascertained with no regard to any ulterior consequences of so interpreting them: see the exposition of principle in the speech of Viscount Simonds in *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, 457. Assuming, without deciding, that there was an infraction or breach of the Treaty of 1926 with the Government of Eire, his lordship could not repair it by applying an inadmissible canon of construction; if there was anything to be put right it must be done by diplomatic means or by legislation. If the Treaty had been incorporated in and was part of the statute, and had thereby lost its superior status and fell to be construed in its context along with the rest of that law, it had been qualified by the plain terms of s. 4 (2). It could not be doubted that the words "entitled under any enactment" included residents in Eire, nor that the exemption to which they were entitled was statutory. His lordship held that as the statute was unambiguous its provisions must be followed, even if they were contrary to international law or any international treaty or arrangement. The plain object of s. 4 (2) was to prevent "dividend stripping," and if the decision of the commissioners stood, residents in Eire could do what their fellow taxpayers in this country were prohibited from doing. Had Parliament intended to exclude residents in Eire from the restrictions imposed by s. 4 (2), nothing would have been easier than to insert a few plain and simple words to that effect. The decision of the commissioners was erroneous and should be reversed and the figures re-adjusted accordingly. Appeal allowed.

His lordship made a similar order in *Inland Revenue Commissioners* v. *Lucbor Dealings, Ltd.*, in which the facts were agreed to be indistinguishable.

APPEARANCES: *Sir Reginald Manningham-Buller*, Q.C., A.-G.; *E. Blanshard Stamp* and *Alan S. Orr* (*Solicitor of Inland Revenue*); *J. G. Foster*, Q.C.; and *P. Shelbourne* (*R. M. Bull & Co.*).

[Reported by Miss J. F. LAMB, Barrister-at-Law]

COMPANY: EXECUTION: PAYMENT TO BAILIFF TO AVOID SALE MORE THAN FOURTEEN DAYS BEFORE WINDING-UP NOTICES RECEIVED: PAYMENT OVER TO SHERIFF WITHIN FOURTEEN DAYS: LIQUIDATOR'S CLAIM

***In re* Walkden Sheet Metal Co., Ltd.**

Wynn Parry, J. 27th July, 1959

Adjourned summons.

On 2nd April, 1958, a creditor issued a writ of *fi. fa.* against a company. On 21st April, 1958, the company paid £500 to the bailiff in respect of the company's indebtedness of £1,532 and undertook to pay off the balance by further instalments. No instalments were in fact paid, and on 8th May, 1958, notices were received by creditors and shareholders for the purpose of a voluntary winding up of the company. On 16th May, 1958, the company went into voluntary liquidation. On 20th May, 1958, the liquidator wrote to the under-sheriffs notifying them that the company was in liquidation and requesting them to hand over the balance of the £500 (a small debt having been paid by the bailiff). On 27th May, 1958, the bailiff transmitted the balance to the under-sheriff. It was not disputed that the payment was made to avoid a sale. The liquidator claimed that he was entitled under s. 325 (1) or s. 326 (1) or (2) of the Companies Act, 1948, to the balance remaining in the hands of the sheriff.

WYNN PARRY, J., said that the money paid to the bailiff did not come within the charge created by the issue of execution but was outside it; it was paid to prevent the charge operating, at any rate *pro tanto*, on the property of the debtor, and therefore it was not included within the phrase in s. 325 (1). Section 326 (1) appeared to him to be dealing with execution properly so-called. Money paid in order to avoid sale was not money paid in or towards satisfaction of the execution, but was money paid to prevent or halt the execution, and therefore when the section referred to money received, it was not talking of money received (as here) to avoid sale but of money received in the carrying out of the execution. Section 326 (2) dealt expressly with money paid to avoid sale, and was the statutory provision which governed this case. The proper approach to this question was to consider the position of the bailiff and his relationship with the sheriff. Although he made an arrangement to receive money on behalf of the creditor, as that money was paid by the company to avoid sale, he had to be regarded as receiving it for the purposes of s. 326 (1) on behalf, in the first instance, of the sheriff. On that reasoning the statutory period of fourteen days during which the sheriff was bound to retain the money started on 2nd April, 1958, and that period had expired before the receipt by the under-sheriffs of the notices on 8th May, 1958. Accordingly the summons must be dismissed.

APPEARANCES: *John Brookes* (*Menassé & Tobin*, for *Whittingham, Glass & Morrison*, Manchester); *Owen Stable* (*Ward, Bowie & Co.*, for *Booth, Wade, Lomas-Walker & Co.*, Leeds).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[3 W.L.R. 616**

VARIATION OF TRUSTS: VARIATION NOT TO BE CARRIED INTO EFFECT IMMEDIATELY: FORM OF ORDER

***In re* Joseph's Will Trusts**

Vaisey, J. 7th October, 1959

Adjourned summons.

An application was made to the court under the Variation of Trusts Act, 1958, to approve an arrangement varying the residuary trusts of a will. None of the variations were to be carried out until after the death of the first tenant for life of the residuary estate.

VAISEY, J., said that he was asked to make a variation under the Act of 1958, in the trusts of the will, and to approve that variation as being for the benefit of those absent persons and person not *sui juris* whose interests he was supposed to consider. It was a simple and easy case. There was no doubt that he could make an order under the Act to approve the arrangement. It was suggested (in this case at any rate) that he should go on to put into the order a direction that the arrangement should be carried into effect, thereby clinching the matter, and precluding it from being raised on any future occasion. The Act itself did not contemplate an order in that form; but he had been told that Lord Jenkins, when sitting as a judge of the Chancery Division, was asked to and did in fact in *Re Derby's Settlement Trusts* (1959), *The Times*, 14th July, direct that such an addition be made to the order in that case, but in *Re Savill's Will Trusts*, 24th July, 1959, unreported, Lord Jenkins thought he ought not to make it. Here the special point was that there was nothing to be done under this scheme to be dealt with immediately except the payment of costs. He thought that, in this case, in which there were no variations to be carried out immediately, it was desirable that he should add to his order approving the variation a direction that the variation so approved should be carried into effect. In this case, at any rate, such an addition was proper and, although not expressly authorised by the Act, it followed inevitably from the jurisdiction which was given to him that such an addition could and should be made to the form of order. The probate of the will should be endorsed with a note of the order.

APPEARANCES: *Kenneth Elphinstone*; *Raymond Walton*; *E. J. A. Freeman* (*Linklaters & Paines*); *D. C. Potter* (*Comptroller and City Solicitor*).

[Reported by Miss V. A. MOXON, Barrister-at-Law]

Queen's Bench Division

DISCOVERY: WRITTEN STATEMENTS MADE BY HOSPITAL STAFF CONCERNING POST-OPERATIVE INFECTION: WHETHER STATEMENTS PRIVILEGED

Patch *v.* United Bristol Hospitals Board

Streatfeild, J. 25th June, 1959

Action.

The plaintiff developed a gas gangrene infection following a surgical operation upon his hand. In accordance with the procedure recommended in the Ministry of Health Circular H.M. (55) 66 of 7th July, 1955, written statements were made by the consulting surgeon, the senior registrar, house surgeons and nurses at the hospital. These statements were all made within ten days of the discovery of the plaintiff's infection, and were sent to the solicitors to the hospital as soon as they were received by the hospital secretary. At the time when the statements were made the plaintiff had not intimated any intention of making a claim in respect of the infection. He subsequently started an action for damages against the defendants, who claimed privilege for the written statements upon the ground that they came into existence solely or mainly for the purpose of enabling the solicitors to advise the board, in contemplation of litigation. On behalf of the plaintiff it was submitted that, since the statements were made at a time when no claim had been made or even adumbrated, it could not be said that they came into existence solely or mainly for this purpose.

STREATFEILD, J., said that the case of *Seabrook* v. *British Transport Commission* [1959] 1 W.L.R. 361; p. 509, *ante*, was manifestly correct. In that case the claim for privilege succeeded. This case was almost an *a fortiori* one because, having regard to the decision of the Court of Appeal in *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, in such a case as the present, where a substantial onus was on the hospital authority when something went wrong in medical or surgical treatment which reasonably gave rise to anticipation of litigation, any statement which was then made by persons concerned with the patient in anticipation of the kind of claim which might be made was clearly privileged. It was not a document which was made in the ordinary course of treatment, but it was made simply because something had gone wrong; in order to provide the legal advisers of the hospital authority with the necessary material to advise, if such a claim should be made, these documents came into existence. Accordingly the claim for privilege must be upheld.

APPEARANCES: *Norman Skelhorn*, Q.C., and *Michael Lavington* (*Cooke, Painter, Spofforth & Co.*, Bristol); *Roger Ormrod*, Q.C., and *F. Cyril Williams* (*Clarke, Gwynn & Press*, Bristol).

[Reported by GROVE HULL, Esq., Barrister-at-Law] **[1 W.L.R. 955**

CRIMINAL LAW: JURISDICTION OF QUEEN'S BENCH DIVISION TO REVIEW PROCEEDINGS OF SENTENCING COURT

Kinally *v.* Home Office

Glyn-Jones, J. 24th July, 1959

Action.

By s. 21 of the Criminal Justice Act, 1948, it is provided that "(4) Before sentencing any offender to corrective training or preventive detention, the court shall consider any report or representations which may be made to the court by or on behalf of the prison commissioners on the offender's physical and mental condition and his suitability for such a sentence. (5) A copy of any report or representations in writing made to the court by the prison commissioners for the purposes of the last foregoing subsection shall be given by the court to the offender or his counsel or solicitor." The plaintiff was convicted at quarter sessions of attempted shopbreaking, and sentenced to nine years preventive detention. He claimed a declaration that before or at the time of the passing of the sentence upon him no copy of the prison commissioners' report was shown to him.

GLYN-JONES, J., said that the Solicitor-General had submitted that the court had no jurisdiction to grant the declaration on the ground that, in substance if not in form, the court was being asked to review the proceedings before a superior court of criminal jurisdiction and to exercise the function of an appellate tribunal. His lordship had come to the conclusion that that was what he was being asked to do in this action, and he was quite satisfied that he had no power to do so; he had no right to review the proceedings or to declare that what was done was or was not in accordance with the law. The remedy of a person sentenced by a court of competent jurisdiction was by way of appeal to the Court of Criminal Appeal, and his lordship did not think that any prisoner had the additional remedy which the plaintiff sought in this case. His lordship had no jurisdiction to grant this declaration, and the action was misconceived. The Solicitor-General's second submission was that upon its true construction s. 21 (5) was directory; the jurisdiction of the court which passed the sentence was not affected by the fact that a copy of the report was not shown to the offender. The question before his lordship was whether upon a proper construction of that subsection the jurisdiction of the court to award a sentence of preventive detention rested upon their having complied with the procedure prescribed by Parliament to be followed before sentence was passed. In his lordship's opinion the judgment in *R.* v. *Wintle* [1959] 1 W.L.R. 849; p. 798, *ante*, entirely supported the Solicitor-General's argument that the provisions of the subsection were directory only and did not go to the jurisdiction of the court.

APPEARANCES: *M. A. B. King-Hamilton*, Q.C., and *Quintin Iwi* (*Edward F. Iwi*); *Sir Harry Hylton-Foster*, Q.C., S.-G., and *J. R. Cumming-Bruce* (*Treasury Solicitor*).

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law]

HOUSING: DUTY OF LOCAL AUTHORITY TO SURVEY HOUSES WITHIN ITS DISTRICT: POWER TO AUTHORISE ENTRY BY INSPECTORS

Bedingfield and Another *v.* Jones

Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.

5th October, 1959

Appeal by case stated.

A local authority, claiming to act under s. 159 of the Housing Act, 1957, authorised a public health inspector to enter a dwelling-house owned and occupied by the appellants for the purposes of inspection and examination, in connection with a survey of all the houses in its district, which it claimed to be entitled to carry out under powers conferred upon the authority by s. 3 (1) of the Act. The appellants refused to allow the inspector to enter. An information was preferred against them by the local authority under s. 160 of the Act, charging them with obstructing the inspector, and they were convicted and fined. They appealed on the ground that the local authority's power to survey and authorise entry into houses was limited to those houses which it had reasonable cause to believe were unfit for human habitation.

LORD PARKER, C.J., said that the general duty laid down in s. 3 (1) of the Act was for the purpose of cataloguing all the premises in the district so as to ensure that the local authority's powers should be exercised in regard to all or any of them. He saw no ground for importing into the subsection the limitation that the duty to inspect an individual house only arose when there was reason to believe that it was unfit for human habitation. If that were right, equally the power of entry given by s. 159 (*c*) was also general; authority might be given for somebody to enter for the purposes of survey or examination to see whether any powers required to be exercised. It was clear that here the local authority was carrying out its duty under s. 3 (1) and the authority given to the inspector to enter the appellants' house was perfectly valid. The justices had come to a correct decision and the appeal would be dismissed.

ASHWORTH and HINCHCLIFFE, JJ., agreed.

APPEARANCES: The first appellant in person; the respondent did not appear and was not represented.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law]

LOTTERY: GENERAL DECLARATION THAT LOTTERIES UNLAWFUL: WHETHER OFFENCE CREATED

Sales-Matic, Ltd. *v.* Hinchcliffe

Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.

7th October, 1959

Case stated by Bradford justices.

The Betting and Lotteries Act, 1934, s. 21, provides: "Subject to the provisions of this Part of this Act, all lotteries are unlawful." The appellant company installed a bubble gum machine, which was operated by the insertion of a penny, upon which the customer obtained as a matter of pure chance either a ball of chewing gum or a ball of gum plus a trinket or charm of trivial intrinsic value, outside two shop premises in Bradford. They were convicted by justices on two charges of unlawfully conducting a lottery by means of such a machine, contrary to s. 21. The company appealed.

LORD PARKER, C.J., said that the only question was whether the words of s. 21 of the Betting and Lotteries Act, 1934, constituted an offence. Section 22 of the Act provided that anyone doing certain specific acts such as printing or selling tickets or using premises in connection with any lottery should be guilty of an offence, the penalties for all offences against that Part of the Act being set out in s. 30. It seemed that the proper construction of s. 21 was that it was a declaration in general terms that all lotteries were unlawful and that s. 22 went on to declare a number of matters connected with the promotion and conduct of a lottery to be offences. Whether, if the company had been charged under s. 22, they could have been held guilty was uncertain. In the normal way the company would most likely have been charged under s. 22 (1) (*f*), in that they used premises for purposes connected with the promotion or conduct of a lottery, but it was probably considered that it would be difficult to say that that part of a pavement outside a shop was premises and recourse was had to the general provisions of s. 21. In his lordship's opinion, s. 21 did not create an offence and the appeal succeeded.

ASHWORTH and HINCHCLIFFE, JJ., agreed. Appeal allowed.

APPEARANCES: *J. Raymond Phillips* (*Ward, Bowie & Co.*, for *James A. Lee & Priestley*, Bradford); *Geoffrey Baker* (*Wilkinson, Howlett & Moorhouse*, for *W. H. Leathem*, Town Clerk, Bradford).

[Reported by A. H. BRAY, Esq., Barrister-at-Law]

SHOPS: SUNDAY CLOSING: WHETHER OPEN FOR THE SERVING OF CUSTOMERS

Betta Cars, Ltd. *v.* Ilford Corporation

Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.

8th October, 1959

Case stated by Essex justices.

The appellants were dealers in second-hand motor vehicles, and occupied for this purpose a shop with a forecourt. On Sunday, 30th November, 1958, the respondents' inspector visited the shop, where he found that the doors were open and five cars were on view to the public, standing partly in the shop

and partly in the forecourt. Prices were marked on the cars and a notice relating to hire purchase was exhibited. No customers were seen to approach the shop. The inspector was informed by the appellants' employee that the shop was open for viewing only. The appellants were convicted by the justices of failing to close the shop for the serving of customers, contrary to s. 47 of the Shops Act, 1950. On appeal, it was submitted on their behalf that unless a sale or something approximating to a sale took place, the shop could not be said to be open for the serving of customers.

LORD PARKER, C.J., said that the justices had decided that they could properly infer that the shop was open for the serving of customers for the purposes of transactions relating to the sale of vehicles. The case turned on the meaning of the phrase "for the serving of customers." If the matter were free from authority, his lordship could not accept the appellants' submission that there must be a sale or something approximating to a sale. Where a shop was open for exhibiting goods, with their prices and terms of sale, and an employee present, to say that the shop was closed for the serving of customers was plainly wrong. The court had, however, been referred to *Waterman* v. *Wallasey Corporation* [1954] 1 W.L.R. 771 as authority for the appellants' submission. In that case the occupier of a garage, which was lawfully open on a Sunday for the serving of accessories, allowed a customer, who was lawfully there for the purpose of buying accessories, to inspect a car which was for sale. The court had pointed out in that case that the object of the section was to protect shop assistants. It was an entirely different position to the present, for in that case the shop was already lawfully open and a customer merely made a casual inquiry about something which could not be lawfully sold on a Sunday. Accordingly, in the present case, the appellants were rightly convicted.

ASHWORTH and HINCHCLIFFE, JJ., agreed. Appeal dismissed.

APPEARANCES: *A. E. Bolton* (*Jas. H. Fellowes*); *G. T. Hesketh Town Clerk*, Ilford).

[Reported by GROVE HULL, Esq., Barrister-at-Law]

AGRICULTURAL HOLDING: POSSESSION: NOTICE TO QUIT

Gladstone *v.* Bower

Diplock, J. 9th October, 1959

Action.

By s. 2 of the Agricultural Holdings Act, 1948, it is provided that "(1) Subject to the provisions of this section, where under an agreement made on or after 1st March, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year . . ." By an agreement in writing dated 29th March, 1956, the plaintiff let to the defendant a farm and land in Flintshire for a term of eighteen months from 1st November, 1955. The defendant did not give up possession on 1st May, 1957, and the plaintiff claimed possession and mesne profits. By her defence the defendant contended, *inter alia*, that by virtue of s. 2 (1) of the Agricultural Holdings Act, 1948, the tenancy took effect as a tenancy from year to year, and since no notice to quit had been given (which was common ground) she was entitled to possession under that tenancy.

DIPLOCK, J., holding that s. 2 (1) of the 1948 Act did not apply to this tenancy agreement, said that the question to be determined was whether this tenancy for a fixed period of 1½ years was a letting for an interest less than a tenancy from year to year. It was thus a question of the applicability of the subsection to the agreement between the parties as distinct from its operation in relation to that agreement. At common law a tenancy for a fixed period of 1½ years clearly created an interest not less than a tenancy from year to year, because the tenant's interest under such a tenancy must continue for more than one year whereas his interest under a tenancy from year to year might determine at the end of one year. A tenancy from year to year at common law was an interest which possessed certain invariable characteristics which constituted a standard by which the magnitude of other interests might be judged: it must last for one year and, unless determined at the end of the first year by notice, be renewed by operation of law for successive periods of one year until determined by notice. In his lordship's view, the expression "tenancy from year to year" in s. 2 (1) must mean a tenancy which created an interest which had those invariable characteristics common to all tenancies from year to year at common law. The lease in the present case was, in his lordship's view, for an interest greater than a tenancy from year to year. So far as this Act was concerned the defendant's tenancy determined by effluxion of time on 1st May, 1957. The plaintiff was entitled to judgment for possession and mesne profits.

APPEARANCES: *R. H. Blundell* (*Theodore Goddard & Co.*); *M. A. L. Cripps*, Q.C., and *B. Rayleigh* (*Ellis and Fairbairn*).

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law]

Probate, Divorce and Admiralty Division

DIVORCE: ELECTION: SUBMISSION OF "NOT SUFFICIENT EVIDENCE"

Meyer *v.* Meyer (Hodge cited)

Collingwood, J. 12th June, 1959

Petition.

A wife petitioned for divorce on the ground of the husband's cruelty. The husband, by his answer, denied the alleged cruelty and sought a divorce on the ground of the wife's adultery with the party cited. At the conclusion of the cases for the wife and for the husband, counsel for the party cited argued that he was entitled to make a submission that the party cited should be dismissed from the suit without being put to his election whether or not to call evidence. Counsel for the party cited said that *Yuill* v. *Yuill* [1945] P. 15, in which it was held that the rule that a party to divorce proceedings making a submission of no case to answer must be put to his election, was a suit in which the submission was made on behalf of the respondent wife and had no application to the present circumstances in which the party cited was in the position of a co-respondent. The provisions of s. 5 of the Matrimonial Causes Act, 1950, were invoked on his behalf; by that section the power of the court to put counsel making a submission to his election was purely discretionary: *Gilbert* v. *Gilbert and Abdon* [1958] P. 131, and *Lance* v. *Lance and Gardiner* [1958] P. 134*n*. It would not be necessary to go so far as to submit that there was no case to answer. The words of s. 5 were "not sufficient evidence," which meant that, although there might be some evidence, there was not enough to satisfy the court as required by s. 4 of the 1950 Act (*Wilson* v. *Wilson* [1958] 1 W.L.R. 1090).

COLLINGWOOD, J., said that he was prepared to hear counsel's submission without putting him to an election. His lordship rejected the submission that there was not sufficient evidence of adultery against the party cited and, after hearing evidence on his behalf, granted a decree *nisi* to the wife on the ground of the husband's cruelty, rejected the husband's cross-prayer, based on the charge of adultery, and dismissed the party cited from the suit with costs.

APPEARANCES: *Gerald Gardiner*, Q.C., and *Victor Williams* (*Allen & Overy*); *W. A. Fearnley-Whittingstall*, Q.C., and *C. A. Marshall-Reynolds* (*Summer & Co.*); *Geoffrey Crispin* (*J. D. Langton & Passmore*).

[Reported by Miss ELAINE JONES, Barrister-at-Law] **[1 W.L.R. 957**

DIVORCE: INSANITY: "INCURABLY OF UNSOUND MIND"

Whysall *v.* Whysall

Phillimore, J. 31st July, 1959

Issue.

A husband, who was a coalminer, was certified insane and entered a mental hospital in 1952, where he had remained. In February, 1958, the wife filed a petition for dissolution of marriage under s. 1 (1) (*d*) of the Matrimonial Causes Act, 1950, on the ground that the husband was incurably of unsound mind, and also on the ground of cruelty. The husband, by the Official Solicitor as his guardian *ad litem*, filed an answer in October,

1958, denying both charges. The question whether the husband was incurably of unsound mind was ordered to be tried as a preliminary issue. According to the medical evidence given at the hearing of the issue, the husband was of unsound mind and the prognosis was that, although he might shortly be released from hospital as "much improved," there was no hope of more than a partial recovery enabling him to live a life as the subject of sympathetic supervision and care. In order to maintain even that degree of recovery, he would have to take regular, prophylactic, self-administered doses of drugs.

PHILLIMORE, J., reading his judgment, said that the intention of Parliament in using the phrase "of unsound mind" must have been to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other, despite five years' treatment, was such as to make it impossible for them to live a normal married life together, and when there was no prospect of any improvement in mental health which would make it possible for them to do so in the future. The state of mind envisaged was, accordingly, a degree of unsoundness or incapacity of mind properly called insanity. If a practical test of the degree was required it was to be found in the phrase used in s. 90 of the Lunacy Act—"incapable of managing himself and his affairs"—provided it was remembered that "affairs" included the problems of society and of married life, and that the test of ability to manage affairs was that to be required of the reasonable man. What effect was to be given to the word "incurably"? If a person might be discharged from hospital in a state in which he could resume married life, managing himself and his affairs, able to make a will and, perhaps, to enter into contracts or act as a trustee, did the fact that he would always have to take a regular dose of a drug to guard against any recurrence of the disease prevent it being said that he was cured? Likewise, what was the degree of cure involved in a semi-social recovery or discharge with the finding "much improved"? If a man could hope to resume a normal married life and to manage himself and his affairs, no ordinary person would describe him as incurably of unsound mind or insane because he had to take a drug once a week or once a day. Equally, however, if in the light of medical knowledge at the time of the inquiry, it was said that the patient's mental state was such that the best that could be hoped for was discharge to conditions where he would not be required to manage himself or his affairs, but would live an artificial existence protected from the normal incidents and problems of life, he would properly be termed incurable. A parallel in the physical sphere was the patient who could go home but who would always be bedridden, who would be termed a permanent invalid. He (his lordship) would conclude, therefore, that in deciding whether a person was "incurably of unsound mind," the test to be applied was whether by reason of his mental condition he was capable of managing himself and his affairs and, if not, whether he could hope to be restored to a state in which he would be able to do so, and he would add to the above test the rider that the capacity to be required was that of a reasonable person. The husband was a chronic case. It was clear that there was no hope of more than a partial recovery, nor could it be said that there was any real prospect of his return to a normal life or normal married life, where he would be able to manage himself and his affairs. Parliament did not intend to treat as cured a man whose optimum prospect of recovery was to be fit for that sort of half-life. The wife had therefore proved her case that the husband was incurably of unsound mind, and she was entitled to a decree *nisi*. Order accordingly.

APPEARANCES: *R. J. A. Temple*, Q.C., and *T. R. Heald* (*P. Alec Cook*, The Law Society Divorce Department, Nottingham); *Roger Ormrod*, Q.C., and *K. R. Bagnall* (*Official Solicitor*).

[Reported by Miss ELAINE JONES, Barrister-at-Law] **[3 W.L.R. 592**

WEEKLY LAW REPORTS: REFERENCES

The following page numbers can now be given in respect of cases published in these columns on the dates indicated:—

10th July, 1959:—

S (an infant), *In re*	1 W.L.R. 921.
Trustees of Tollemache Settled Estates *v.* Coughtrie (Inspector of Taxes)	1 W.L.R. 900.
Turner's Will Trusts, *In re*; Bridgman *v.* Turner	3 W.L.R. 498.

24th July, 1959:—

Bernstein *v.* Bernstein	3 W.L.R. 481.
Fisher *v.* Fisher	3 W.L.R. 471.
Mwenya, *Ex parte*	3 W.L.R. 509.

31st July, 1959:—

Cohen's Will Trusts, *In re*; Cohen's Settlement Trusts, *In re*	1 W.L.R. 865.
Sleafer *v.* Lambeth Metropolitan Borough Council	3 W.L.R. 485.

7th August, 1959:—

R. *v.* Caddy	1 W.L.R. 868

14th August, 1959:—

Addis *v.* Crocker	3 W.L.R. 527.
Bolton's (House Furnishers), Ltd. *v.* Oppenheim	1 W.L.R. 913.

28th August, 1959:—

St. Martin's Theatre, *In re*; Bright Enterprises, Ltd. *v.* Willoughby de Broke	1 W.L.R. 872.

11th September, 1959:—

Wragg (deceased), *In re*; Hollingsworth *v.* Wragg	1 W.L.R. 922.

25th September, 1959:—

Electrix, Ltd. *v.* Electrolux, Ltd.	3 W.L.R. 503.

"THE SOLICITORS' JOURNAL," 22nd OCTOBER, 1859

ON the 22nd October, 1859, THE SOLICITORS' JOURNAL enumerated the arrangements for the forthcoming annual meeting of the Metropolitan and Provincial Law Association in London. It said that "the coming meeting will be attended by a very large and influential body of provincial members . . . The association will meet for the purpose of reading papers and transacting its ordinary business in the Council Room of the Incorporated Law Society. The business will commence by an address by J. Beaumont, Esq., the chairman of the managing committee, after which papers will be read . . . on Land Registry, Legal Education, the true basis of Professional Union, the Trustees Relief Act, the principles and practice of the newly-opened Court of Admiralty, the Abolition of Oaths, Imprisonment by County Court Judges and the Local Courts of the City of London. At the conclusion of the first day's business a dinner at the London Tavern, at which the Right Hon. D. W. Wise, the Lord Mayor, will preside, will be given by the town members to their country guests and on Thursday evening there will be a soirée at the rooms of the Incorporated Law Society . . . Arrangements have also been made for . . . visiting a number of objects of unusual interest such as the valuable galleries of paintings at Apsley House, and Bridgwater House, which have been generously thrown open by their noble owners; the Galleries of Portraits belonging to the Royal Society, the Flaxman Gallery at University College, the library and historic curiosities provided by the Corporation of the City of London at the Guildhall Library which include a conveyance executed by Shakespeare . . . The arrangements for the third day will also include a visit to the Mansion House when the visitors will . . . appreciate . . . the hospitality for which the City is so famous."

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Lands Tribunal (Amendment) Rules, 1959. (S.I. 1959 No. 1732.) 6d.

These rules amend the Lands Tribunal Rules, 1956. New rules, forms and fees are added to regulate the issue of certificates for the registration of notices under the Rights of Light Act, 1959, s. 2. Other amendments include an amendment to r. 29 which will permit the selection of a test case from two or more appeals involving the same issue of fact, and an amendment to r. 51 which will allow a limited extension by consent of the parties of the times appointed by the rules for the submission of certain documents in the nature of pleadings.

Registers of Local Land Charges (Rights of Light, etc.) Rules, 1959. (S.I. 1959 No. 1733.) 7d.

These rules regulate the registration of notices under the Rights of Light Act, 1959, s. 2, in the registers of local land charges. Minor amendments are also made in a number of existing rules concerning registration of local land charges.

Stopping up of Highways Orders, 1959:—

City and County of Bristol (No. 9). (S.I. 1959 No. 1696.) 5d.

County of Buckingham (No. 10). (S.I. 1959 No. 1697.) 5d.

County of Chester (No. 22). (S.I. 1959 No. 1717.) 5d.

City and County Borough of Coventry (No. 11). (S.I. 1959 No. 1698.) 5d.

County of Durham (No. 7). (S.I. 1959 No. 1704.) 5d.

City and County Borough of Leeds (No. 2). (S.I. 1959 No. 1699.) 5d.

County of Middlesex (No. 5). (S.I. 1959 No. 1718.) 5d.

County of Worcester (No. 7). (S.I. 1959 No. 1719.) 5d.

SELECTED APPOINTED DAYS

October

16th Dog Licences Act, 1959.

Lands Tribunal (Amendment) Rules, 1959. (S.I. 1959 No. 1732.)

Registers of Local Land Charges (Rights of Light, etc.) Rules, 1959. (S.I. 1959 No. 1733.)

Rights of Light Act, 1959 (except ss. 1 and 6).

29th Legitimacy Act, 1959.

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Hire Purchase — Initial Deposit Not Paid — Whether Guarantor Bound by Guarantee

Q. Instructing solicitors act for the guarantor of a hire-purchase agreement. The guarantor has now learnt that, although the hire-purchase agreement recited that the usual deposit had been paid, in fact no deposit had been paid. It is probable that the hire-purchase company had no knowledge of this and it is probable that there is a clause in the hire-purchase agreement that the garage which was to receive the deposit was not the agent of the hire-purchase company. Is the guarantor bound if the hire-purchase agreement: (*a*) did, (*b*) did not, include the clause about agency? The deposit was later paid but the hirer has gone.

A. Whether or not the hire-purchase agreement included the clause about agency, we think it is probable that the guarantor is bound by the guarantee. We have been unable to find any authority directly in point, but *Chatterton* v. *Maclean* [1951] 1 All E.R. 761 seems to point to this conclusion. Of course, the opposite would be the case if one of the statutory requirements as to hire-purchase agreements had not been complied with, but an obligation to pay a deposit of a certain amount does not appear to be a statutory requirement for this purpose: see Halsbury's Laws of England, 3rd ed., vol. 19, p. 528, para. 849. Perhaps it would be true to say that a guarantor will be released only where there has been a breach by the hirer followed by a failure by the owner to comply with a condition of the contract of guarantee (see, e.g., *Midland Counties Motor Finance Co., Ltd.* v. *Slade* [1951] 1 K.B. 346). In the present case there does not seem to have been a failure by the hire-purchase company to comply with the guarantee agreement. See also Chitty on Contracts, 21st ed., vol. 2, p. 318.

Passing-off—Selection of Name Not Calculated to Deceive

Q. A client of mine contemplates forming a private limited company, the title of which will incorporate his own name, i.e., "House of *X* (1857), Ltd." He was formerly employed with a company, *X* & Sons (Bootmakers), Ltd., and is in fact a descendant of the original founder, and whilst he deliberately seeks to attract goodwill inherent in the name of *X* used in context with bootmakers, he does not propose to enter the retail trade being carried on by that company, that is, in competition with the company. Quite apart from the requirements of the Companies Act, 1948, are you of the opinion that my client may properly proceed with his proposal having regard to, e.g., *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678?

A. Independently of the provisions of the Companies Act, 1948, a company must select a name which is not calculated to deceive, and it is no excuse for choosing a deceptive name that a shareholder to whom that name belongs might lawfully use it in his own business. This rule applies where there is an appropriation by one man of the trade reputation or custom of another: see Salmond on Torts, 12th ed., p. 667. In the light of these principles and in view of the fact that your client "deliberately seeks to attract goodwill inherent in the name of *X* used in context with bootmakers," we doubt whether your client may properly proceed with this proposal. As Cotton, L.J., said in *Turton* v. *Turton* (1889), 42 Ch. D. 128, at p. 144: "When a man knows that the natural consequence of what he is doing is to represent his goods as the goods of somebody else, then it is wrong on his part to continue that act." See also the consideration of this topic in Winfield on Tort, 6th ed., pp. 742–744.

Rating of Fishing Rights

Q. It has been suggested to us that if a letting of a lake to an angling society for fishing is carried out by means of a licence rather than a tenancy the hereditament does not become liable to rating. So far as we can see a licence would be caught just as much as a tenancy and create a rateable hereditament within the meaning of s. 6 of the Rating Act, 1874. However, is there any other way round the difficulty to prevent the fishing rights becoming rateable?

A. The law regarding the rating of sporting rights is far from simple. Basically, however, the position would appear to be as follows: (1) Where the owner of land has let the land but retained the rights then s. 6 (1) of the Rating Act, 1874, applies and if the owner receives rent for the land, the land will be assessed as enhanced in value by the rights. The occupier of the land will be entitled, however, to deduct from this rent any extra rates paid by him on account of the sporting rights. In the case of agricultural land (and probably other derated land) the owner will be rateable in respect of the sporting rights (*Hastings* v. *Walsingham Revenue Officer* (1930), 12 R. & I.T. 19). (2) Where the owner retains the land but lets the rights then

s. 6 (2) of the 1874 Act applies and either the owner or the lessee of the rights is to be rateable in respect of them: the rating authority can determine which. However, " let " in this context means " let by deed " (see *Swayne* v. *Howells* (1927), 5 R. & I.T. 15, and *Towler* v. *Thetford Rural District Council* (1929), 11 R. & I.T. 134, 171). (3) Where the owner occupies the land and the sporting rights, or the owner occupies the land and the sporting rights have been let other than by deed, the land will be assessed as enhanced by the sporting rights. If, therefore, the fishing rights are let by deed a separate rateable hereditament will be created, but if the letting is not by deed or there is merely a creation of a licence the fishing rights will not be separately assessed but the assessment on the land will be increased to take account of the rights. See also *Clay and Clay* v. *Newbigging* (1956), 49 R. & I.T. 203, and *Fenwick* v. *Capstick and Weardale Rural District Council* (1956), 49 R. & I.T. 38.

Malicious Damage—Conditional Discharge by Justices—Whether Bar to Civil Proceedings

Q. We are acting for a client whose motor vehicle was deliberately damaged by *H.D.* Our client reported the matter to the police and *H.D.* was charged with malicious damage. We are not sure under which Act the summons was issued, but we have written to the justices' clerk. *H.D.* pleaded guilty at the hearing and the justices discharged him conditionally on his paying costs, presumably under s. 7 of the Criminal Justice Act, 1948. Immediately after the occurrence our client instructed us to commence proceedings in the county court, and we have issued a summons which is due for hearing shortly. *H.D.'s* solicitors have raised s. 67 of the Malicious Damage to Property Act, 1861. We take the view that *H.D.* has not suffered any of the matters referred to in the section. We shall be pleased to have your views, together with any authority.

A. The question is, of course, whether *H.D.* has been " convicted of any offence punishable upon summary conviction by virtue of " the Malicious Damage Act, 1861. We think that he has and that this view is supported by *R.* v. *Blaby* [1894] 2 Q.B. 170 and *R.* v. *Frank Sheridan* [1937] 1 K.B. 223. It should be noted, too, that in the form of Order for Conditional Discharge contained in Stone's Justices' Manual, 91st ed., vol. 2, at p. 2570, it is said that the defendant, " having consented to be tried summarily, is this day convicted . . ." In our opinion, therefore, *H.D.* is " released from all further or other proceedings " in respect of the damage which he caused to your client's vehicle. See also Halsbury's Laws of England, 3rd ed., vol. 10, p. 897, para. 1748.

Will—Construction—*Per Stirpes* or *Per Capita* Division

Q. By his will, a testator gave his residue unto his trustees upon trust for the son and four daughters of his brother *A*, the son and daughter of his brother *B*, the two sons and three daughters of his brother *C*, and the two sons and three daughters of his sister *D*, or the survivor or survivors of them in equal shares absolutely. Is the division *per capita* (so that each child gets a one-seventeenth share) or is the division *per stirpes* (so that the residue is divided into four, the children of each brother or sister dividing a fourth share between them) ?

A. Division is *prima facie per capita* (*Re Alcock* [1945] Ch. 264). On the facts given there is nothing in the context to displace that rule; on the contrary, the addition of the words " in equal shares " can be said to provide expressly for division *per capita*. Consequently we think in this case each child takes a one-seventeenth share.

NOTES AND NEWS

COLONIAL APPOINTMENTS

The following promotions and appointments are announced in the Colonial Legal Service: Mr. C. V. Boyle, Resident Magistrate, Kenya, to be Senior Resident Magistrate, Kenya; Mr. J. A. P. Compton to be Assistant to Attorney-General, Windward Islands; Mr. D. S. Davies, Crown Counsel, Kenya, to be Senior Crown Counsel, Kenya; Sir Ragnar Hyne to be Magistrate, Gibraltar; Mr. E. Light, Magistrate, Fiji, to be Chief Magistrate, Aden; Mr. R. R. Phillips, Puisne Judge, British Guiana, to be Puisne Judge, Jamaica; Mr. J. S. Rumbold, Crown Counsel, Kenya, to be Senior Crown Counsel, Kenya; Mr. A. W. Symmonds, Deputy Registrar, Barbados, to be Crown Solicitor, Barbados.

BUILDING SOCIETIES

House Purchase and Housing Act, 1959

The Swindon Permanent Building Society has been designated for the purposes of s. 1 of the House Purchase and Housing Act, 1959. The latest list of building societies so designated was published at p. 818, *ante*.

TRUCK ACTS INQUIRY: EVIDENCE

Notice of intention to submit evidence to the committee who are inquiring into the operation of the Truck Acts should be sent to Mr. R. M. Walker, Ministry of Labour, 8 St. James's Square, W.1, before 16th November, 1959.

THE SOLICITORS ACT, 1957

On 23rd April, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that Ronald Rose, of 75 Lee High Road, Lewisham, London, S.E.13, be suspended from practice for a period of one (1) year from 23rd April, 1959, or in the event of an appeal being lodged from the date upon which the findings and order of the Committee were filed with The Law Society, and that he do pay to the complainant his costs of and incidental to the application and inquiry. An appeal having been dismissed, the findings and order of the Committee were filed with The Law Society on 6th October, 1959.

FAMOUS ACTION FOR SLANDER RECONSTRUCTED

Perhaps the most famous slander action in British legal records, the " Bacarrat " case of 1891, will be the next celebrated trial to be reconstructed for radio in the B.B.C.'s Home Service series, " The Verdict of the Court." It can be heard at 8 p.m. on Friday, 23rd October.

Honours and Appointments

Mr. E. Roy Lawrence, solicitor, of London, has been appointed clerk to the National Health Service Tribunal in succession to Mr. R. B. Cooke, who has resigned.

Mr. J. Lindsay, solicitor, of Sheffield, has been appointed assistant magistrates' clerk to Leicester City magistrates in succession to Mr. Charles Collins who became clerk recently on the retirement of Mr. W. E. Blake-Carn.

Mr. Alfred Henry Sayer has been re-elected chairman of Birmingham City magistrates. Mr. Sayer has been a Birmingham city magistrate since 1942 and chairman since 1952.

" THE SOLICITORS' JOURNAL "

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